89-1887

(1)

No. _____

Supreme Court, U.S.
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IN THE
UNITED STATES SUPREME COURT
OCTOBER TERM, 1989

THE STATE OF TEXAS,
Petitioner,

v.

CLARENCE LEE BRANDLEY,
Respondent.

On Petition For Writ Of Certiorari
To The Texas Court Of Criminal Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether the court below erred under *Teague v. Lane*, 489 U.S. ___, 109 S.Ct. 1060 (1989), in announcing on collateral review a new rule of federal constitutional law and giving it retroactive effect in this case.

II. Whether the Due Process Clause imposes upon the State an obligation to conduct an investigation that does not focus solely on the accused to the exclusion of other suspects or leads, regardless of the fact that the evidence available to law enforcement authorities points overwhelmingly to the accused.

III. Whether the Texas Court of Criminal Appeals, on the facts of this case, failed to apply or misapplied the materiality test established by this Court in the area of "constitutionally guaranteed access to evidence."

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TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

NOW COMES the State of Texas, Petitioner herein, by and through its attorney, the District Attorney for the Ninth Judicial District of Texas, and files this *Petition for Writ of Certiorari*.[1]

OPINIONS BELOW

The opinion of the Texas Court of Criminal

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[1]For clarity, the Petitioner is referred to as "the State," and Respondent as "Brandley."

Appeals granting Brandley's second application for writ of habeas corpus, reversing his conviction, and remanding for a new trial is attached hereto as Appendix A. *Ex parte Brandley*, 781 S.W.2d 886 (Tex. Crim. App. 1989). The State's Motion for Rehearing was denied without written order on January 17, 1990, and a copy of the State's notification of this disposition is attached hereto as Appendix B. The order of the Court of Criminal Appeals denying Brandley's first application for writ of habeas corpus is attached to the petition as Appendix E. The opinion of the Texas Court of Criminal Appeals affirming Brandley's conviction on direct appeal is attached as Appendix D. *Brandley v. State*, 691 S.W.2d 699 (Tex. Crim. App. 1985).

JURISDICTION

The opinion of the Texas Court of Criminal Appeals was delivered on December 13, 1989 (Appendix A). A timely filed Motion for Rehearing was denied on January 17, 1990 (Appendix B). This petition for writ of certiorari is timely filed pursuant to the Order entered May 16, 1990, granting an extension of the ninety (90) day time period provided for by Rule 13.1 of the Rules of the Supreme Court, up to and including May 28, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

Section 1 of the Fourteenth Amendment to the United States Constitution provides as follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law

> which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition Below

Brandley was indicted, in Cause No. 14,666, for the capital murder of Cheryl Fergeson. Trial was held in the 221st District Court of Montgomery County, Texas. Brandley's first trial ended in a mistrial when the jury was unable to reach a verdict. A second trial resulted in Brandley's conviction of the capital offense, and the death penalty was assessed. On direct appeal the Texas Court of Criminal Appeals affirmed Brandley's conviction holding, among other things, that the evidence was sufficient to sustain the conviction. *Brandley v. State*, 691 S.W.2d 699 (Tex. Crim. App. 1985) (Appendix D).

Brandley then filed an application for writ of habeas corpus, pursuant to Article 11.07, Texas Code of Criminal Procedure, contending that there was newly discovered evidence, that the State purposely excluded all blacks from the petit jury, that the State withheld favorable evidence, that there was jury misconduct, and that three jurors were improperly excused. Following an evidentiary hearing the trial court concluded that none of the grounds had merit, and the Texas Court of Criminal Appeals agreed, denying Brandley's application for writ of habeas corpus in a *per curiam* unpublished order. *Ex parte Brandley*, No.

9691-02 (Tex. Crim. App. -- December 22, 1986) (*en banc*) (Appendix E).

A second application for writ of habeas corpus was filed on March 20, 1987, asserting six grounds for relief. Each of these grounds was based exclusively on the federal constitution. On June 30, 1987, the Texas Court of Criminal Appeals ordered the trial court to conduct an evidentiary hearing and to submit findings of fact and conclusions of law. A special judge was appointed to preside over the post-conviction proceeding, and in compliance with the order of the Court of Criminal Appeals, the habeas court conducted a ten day long evidentiary hearing. On November 19, 1987, the Court of Criminal Appeals received the habeas court's findings of fact and conclusions of law, despite the fact that the habeas court did not yet have access to the hearing record.[2] The court reporter completed transcription of the evidentiary hearing record on November 30, 1987, some *eleven (11) days* after the habeas court entered its findings. The Texas Court of Criminal Appeals ordered both parties to file briefs on the merits. On January 18, 1988, oral argument was heard, and the writ submitted on just three of the original six grounds for relief. The Texas Court of Criminal Appeals issued its opinion granting Brandley a new trial on December 13, 1989, holding that Brandley was entitled to relief under the Due Process Clause of the Fourteenth Amendment of the United States Constitution on only one of the original grounds for relief, that being:

> The pretrial investigative procedures utilized by the State were so impermissibly

[2]This is borne out by the fact that the habeas court's findings did not include a single citation to the record from the evidentiary hearing. Similarly, the habeas court made no reference to the record from either of Brandley's trials.

> suggestive of the Petitioner that it created false testimony calculated to manufacture circumstantial evidence against Petitioner in violation of his constitutional rights to due process of law and a fundamentally fair trial.

The majority opinion of the Texas Court of Criminal Appeals did not address the other two grounds for relief which had been argued and submitted, although they were fully addressed and rejected by Judge Campbell in his dissent. The majority opinion did not rely in any respect on state law grounds. The State's Motion for Rehearing was summarily denied on January 17, 1990 (Appendix B).

B. Statement of Facts

On Saturday, August 23, 1980, at 9:10 a.m., Cheryl Dee Fergeson, the sixteen-year-old manager of the Bellville High School girls' volleyball team, arrived with her teammates at Conroe High School for a scrimmage. Shortly after her arrival at an annex gym with the team, Cheryl left the gym. Some two hours later, her nude body was found in a loft area of the school auditorium. She had been strangled and raped.

The State's testimony showed that Gary Acreman, Henry Peace, Sam Martinez, and John Sessum were janitors at the high school. All the janitors, except Sessum, who was not called as a witness, testified that they had arrived at the school at about 7:30 a.m. About ten minutes later, Clarence Brandley, their supervisor, arrived and unlocked the doors to the main building to let them in. He directed all the janitors, except Peace, to set up chairs in the cafeteria; Peace was sent to buff the floor in the teachers' lounge. Acreman, Sessum and Martinez

finished their work some time between 9:00 and 9:30 and went to wait in the hallway between the cafeteria and the auditorium for Brandley to come and give them their next assignment. While waiting there, a girl matching Cheryl Fergeson's description approached from the direction of the gym and entered the ladies restroom which was situated on a landing off the hallway. A door which accessed the auditorium and the loft was on the same landing.

Several minutes later, Brandley approached. He had several rolls of toilet paper in his hands. As Brandley started up the stairs to the restroom, Acreman told him there was a girl in the restroom. Saying he wasn't going in the girls' room, Brandley told the janitors to go find Peace and to go across the street to the vocational building and meet him there. Since Brandley was the only one present who had any keys to the high school, the four janitors waited for Brandley on the lawn outside. Approximately forty-five minutes went by until Brandley appeared at a door to the main building and told Peace to come over and get the keys. The janitors set up chairs in the vocational building for somewhere between thirty and sixty minutes, then Brandley reappeared and sent all of them, but Peace, home.

Peace and Brandley went back to the main building. After a short while they heard people calling for Cheryl. Brandley told Peace they should help look for her. Peace noticed that two doors to the auditorium, which testimony established had been locked the previous evening, were now open. Brandley told Peace to go look in the loft. When Peace found nothing, Brandley told him to go back up and "look real good." Again, Peace found nothing. After looking in some other places for a while, Brandley sent Peace to the loft a third time to "look real good," this time accompanying

Peace. This time, Peace found Cheryl's body, hidden behind a piece of plywood.

The autopsy revealed that Cheryl had been strangled and raped. Her bladder was empty, indicating she had just urinated. The strangulation mark on her neck measured 1 1/4 inches in width, exactly matching Brandley's belt in size. Cheryl's clothes were found in a dumpster the following Monday, in a plastic garbage bag like the ones used at the high school. A mop string was found with the clothes. Various hairs were recovered from the crime scene and Fergeson's clothes. The only hairs that had been forcibly removed, thus having more significance to the investigation, were negroid in origin. According to a defense expert, these hairs were "identical in all observable characteristics to Brandley's." None of the hairs was similar to Peace's. Tests conducted on semen stains on Cheryl's clothing revealed the presence of blood group factors A and H. As Cheryl was a type "A" secretor, this finding is consistent with the attacker having either type "A" or type "O" blood. Brandley's blood was type "O."

Assessing this evidence on direct appeal, the Court of Criminal Appeals held that "[n]o reasonable hypothesis is presented by the evidence to even *suggest* that someone other than [Brandley] committed the offense." *Brandley v. State*, 691 S.W.2d 699, 704 (Tex. Crim. App. 1985) (emphasis in original) (Appendix D at D-8).

REASONS FOR GRANTING THE WRIT

I.

THERE ARE SPECIAL AND IMPORTANT REASONS TO GRANT THE WRIT.

Rule 10 of the Rules of this Court provides that "review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor." An irreconcilable conflict between the decision of a state court of last resort and the decision of another state court of last resort or a federal court of appeals is a well established ground for granting certiorari, *e.g.*, *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 753 n.1 (1985), as is the resolution by a state court of last resort of a federal question in a manner that conflicts with pertinent decisions of this Court. Both circumstances are present here.

A. Certiorari should be granted because the decision of the court below contravenes this Court's decisions regarding constitutionally guaranteed access to evidence.

The court below has imposed upon the State a broad and unprecedented due process obligation to perform an investigation that pursues every lead, conducts all conceivable scientific tests, and preserves all evidence, even though the evidence available to the police points only to the accused. The Court of Criminal Appeals found error under the Due Process Clause of the Fourteenth Amendment without reference to whether information not provided to the defense was materially favorable to Brandley under *United States v.*

Bagley, 473 U.S. 667 (1985), and *United States v. Agurs*, 427 U.S. 97 (1976). The Court of Criminal Appeals likewise found that the loss of certain physical evidence violated Brandley's due process rights, even though Brandley did not show, and the court did not find, the bad faith required by *Arizona v. Youngblood*, 488 U.S. ___, 109 S.Ct. 333 (1988). Further, the court below determined that the entire investigation was impermissibly suggestive because the police did not pursue all leads that might have led to evidence favorable to Brandley, even though the information available to the police overwhelmingly inculpated Brandley.

Purporting to apply a totality of the circumstances test, the Court of Criminal Appeals combined various due process theories, no one of which would entitle Brandley to relief, and found due process error without the requisite showing of materiality or bad faith. In so doing, the court below created a new rule that eliminates precisely those elements that properly limit the reach of due process to cases involving the denial of a fundamentally fair trial. The decision of the court below contravenes the precedent of this Court; at best, the decision amounts to glaring error of federal constitutional law.

B. Certiorari should be granted to resolve an irreconcilable conflict that exists among various state courts of last resort and federal courts of appeals involving an important and recurring issue of constitutional law.

The holding and reasoning of the Court of Criminal Appeals is at odds with the decisions of numerous state courts of last resort that have adopted, interpreted, and applied this Court's decision in *Brady*

v. Maryland, 373 U.S. 83 (1963), and its progeny, as well as *Arizona v. Youngblood*, 488 U.S. ___, 109 S.Ct. 333 (1988).[3] Some state courts hold that the rights guaranteed an accused by the Due Process Clause of the Fourteenth Amendment do not include a requirement that the State exhaust every possible lead or conduct certain scientific tests. *E.g. Siglar v. State*, 541 N.E.2d 944 (Ind. 1989). The remaining cases hold that, absent a showing of bad faith or materiality, the inadvertent loss or destruction of evidence does not constitute a deprivation of any right guaranteed an accused by the Due Process Clause. *E.g. State v. Seifert*, 557 A.2d 494 (Vt. 1989). For example, in *Commonwealth v. Troy*, 540 N.E.2d 162 (Mass. 1989), a defendant charged with first degree murder submitted his blood for testing at a state laboratory, claiming that test results would show a high level of drugs and thus support his intoxication defense. The sample was carelessly destroyed prior to testing. In applying the materiality criterion mandated by *Youngblood* and its predecessors, the Massachusetts Supreme Court held that to establish a due process violation, a defendant must demonstrate "a reasonable possibility based on concrete evidence rather than fertile imagination that access to the evidence would have produced evidence favorable to his cause." *Troy*, 540 N.E.2d at 167. Because the defendant was convicted only of general intent crimes, to which intoxication was not a defense, he could not meet this burden. Similarly, the decision of the court below does not coincide with any decisions of the federal courts of appeals that have considered claims such as Brandley's since this Court's decision in *Youngblood*. For instance, in *Miller v. Vasquez*, 868 F.2d 1116 (9th

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[3]Attached hereto as Appendix C is a list containing summaries of various decisions of state courts of last resort and federal courts of appeals applying the principles and analysis set forth by this Court in *Youngblood*.

Cir. 1989), a habeas corpus petitioner claimed that his due process rights were violated by the state's failure to collect, preserve and test the assault victim's blood-stained jacket and to photograph his scratched arms. The court held:

> [s]ince, in the absence of bad faith, the police's failure to *preserve* evidence that is only potentially exculpatory does not violate due process, then a fortiori neither does the good faith failure to *collect* such evidence violate due process.

Id. at 1120 (emphasis in original).

The holding in the instant case, that the failure of the police to follow certain supposed leads or to perform certain scientific tests violates a defendant's due process rights, is in direct conflict with the cases cited in Appendix C. Review by this Court is therefore necessary to resolve this conflict and allow for a uniform interpretation and application of the Due Process Clause to claims relating to police investigation and scientific testing of physical evidence.

II.

THE COURT BELOW ERRED IN FINDING A DUE PROCESS VIOLATION BASED ON A DENIAL OF CONSTITUTIONALLY GUARANTEED ACCESS TO EVIDENCE.

A. None of the factors identified by the Court of Criminal Appeals, in finding a due process violation, are "material" in the constitutional sense.

This Court has consistently limited the area of "constitutionally guaranteed access to evidence" to evidence that is material to the defense. *United States v. Valenzuela-Bernal*, 488 U.S. 858, 867 (1982). Thus, a prosecutor is not required to deliver his entire file to the defense but, rather, must disclose only favorable evidence that is material to issues of guilt or punishment. *United States v. Bagley*, 473 U.S. 667, 674-75 (1985); *United States v. Agurs*, 427 U.S. 97, 112-13 (1976). "[E]vidence is material *only* if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *United States v. Bagley*, 473 U.S. at 682 (emphasis added). A reviewing court's assessment of the materiality of evidence not provided to the defense must be made "in light of the totality of the circumstances and with awareness of the difficulty of reconstructing in a post trial proceeding the course that the defense and the trial would have taken had the defense been given access" to the evidence. *Id.* at 683.

Similarly, the government's duty to preserve evidence is limited to evidence that is material. In this

context, the materiality criterion is couched in terms of "bad faith." *Arizona v. Youngblood*, 488 U.S. ___, ___, 109 S.Ct. 333, 337 (1988). To implicate due process guarantees, the unpreserved evidence must "possess an exculpatory value that was apparent before the evidence was destroyed," *California v. Trombetta*, 467 U.S. 479, 488-89 (1984), and the existence of "bad faith" hinges on police knowledge of the exculpatory value. *Youngblood*, 488 U.S. at ___ n.**, 109 S.Ct. at 336 n.**.

It is clear that the Court of Criminal Appeals not only failed to apply properly these firmly established principles, but failed to apply them at all.[4] In the present case, the court below summarized its holding as follows:

> Although any of these incidences alone might not support applicant's claim, there can be no doubt that the cumulative effect of the investigative procedure, judged by the totality of the circumstances, resulted in a deprivation of applicant's right to due process of law by suppressing evidence favorable to the accused, and by creating false testimony and inherently unreliable testimony. Accordingly, applicant's conviction must be reversed.

Ex parte Brandley, 781 S.W.2d 886, 894 (Tex. Crim. App. 1989) (Appendix A at A-18-19). Nowhere does the majority apply a materiality test under *Brady* or *Youngblood*. Moreover, as set forth in great detail in

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[4]Indeed, the majority chides the dissent for evaluating the habeas court's findings in light of the entire record, *Ex parte Brandley*, 781 S.W.2d at 888 n.1 (Appendix A at A-3), although that is what this Court's decisions require, *United States v. Bagley*, 473 U.S. at 683.

Presiding Judge McCormick's dissenting opinion, the factual findings underlying the majority's conclusion are clearly erroneous in light of the record. *Id.* at 896 (McCormick, P.J., dissenting) (Appendix A at A-22). Nonetheless, even accepting those findings as accurate, none of the factual circumstances upon which the majority relied are material in the constitutional sense.

The Court of Criminal Appeals relied upon the following facts to supports its conclusion:

1. Texas Ranger Wesley Styles arrested Brandley prior to initiating his investigation. *Id.* at 888 (Appendix A at A-4).

2. A "walk-through" conducted by Ranger Styles with three janitors other than Brandley may have induced those witnesses to alter their stories so that they would coincide. *Id.* at 893 (Appendix A at A-16).

3. The State failed to disclose to the defense that Ranger Styles intimidated janitor Peace, and police did not pursue a "lead," provided by Peace, that janitor Acreman informed him that he [Acreman] saw Brandley having fun with a good looking girl. *Id.* at 894 n.8, 891 (Appendix A at A-11).

4. The State failed to obtain, and resisted defense efforts to obtain, hair and blood samples from white janitors. *Id.* at 890 (Appendix A at A-8-9).

5. The State failed to analyze, and allowed the destruction of, semen samples collected by the medical examiner during autopsy. *Id.* at 890 (Appendix A at A-9-10).

6. Police failed to pursue a "lead" provided by Cheryl Bradford, that she saw two white men hurriedly walk through the school gymnasium and leave the building, and did not disclose such information to the defense. *Id.* at 891-92 (Appendix A at A-10-11).

The foregoing circumstances, whether considered individually or cumulatively, fall far short of satisfying the materiality criterion required in "access to evidence" cases. First, the circumstances surrounding Brandley's arrest do not even remotely suggest a "blind focus" in investigation. Ranger Styles entered the case to assist an ongoing investigation, and he arrested Brandley under the authority of an arrest warrant, issued by a magistrate whose neutrality is not questioned. The warrant issued on the basis of information obtained by other law enforcement officials, through procedures not questioned by Brandley, that included Brandley's admission that he was the only person who had access to the locked area of the school in which the victim's body was found.

Second, the "walk through" is not probative of an improper investigation of the crime. Any question regarding the "suggestiveness" of the "walk through" is dispelled by the record in this case. The three janitors who "walked through" the high school with Ranger Styles, showing him where they had been at times pertinent to the investigation, had given written state-

ments to Conroe police five days before the "walk through" and before Ranger Styles had any involvement in the investigation. No complaint has ever been made that these statements were taken under coercive or otherwise improper circumstances. Following the "walk through," each janitor gave an additional written statement to Conroe police officers.[5] No claim is made, nor does the record support an inference, that the contents of the post-"walk through" statements of Acreman and Martinez were the product of improper influence by any law enforcement officials.

The basic difference between the two sets of statements is that the statements taken after the "walk through" are longer and more detailed than the initial ones. Certainly, there is no significant inconsistency between the pre- and post-"walk through" statements of any of the three janitors such as would suggest, let alone establish, that the walk-through procedure was "so unnecessarily suggestive and conducive to irreparable mistaken identification" or testimony as to violate due process. *See Stovall v. Denno*, 388 U.S. 293, 302 (1967).[6] Significantly, all of the statements are consis-

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[5]Both the pre- and post-"walk through" statements are set out *verbatim* in Judge Campbell's dissenting opinion. *Ex parte Brandley*, 781 S.W.2d at 918-23 (Campbell, J., dissenting) (Appendix A at A-83-89).

[6]Although one janitor, John Sessum, claimed at the evidentiary hearing that Ranger Styles threatened him with arrest if he did not cooperate, he made no claim that Ranger Styles or anyone else associated with the police or prosecution asked or told him to lie or to tell anything other than the truth. There is no evidence in the record that, prior to March of 1987, Sessum told anyone, let alone responsible law enforcement agencies, the version of events he related at the post-conviction evidentiary hearing. Further, as with the other janitors involved, Sessum's statements to police during the investigation were consistent with those of the other janitors, including Brandley. In any event, Sessum did not

(footnote continued on next page)

tent in every material respect with Brandley's own version of the events, as detailed in his written statement, grand jury testimony, and testimony at his first trial, the truthfulness of which is not challenged by Brandley. Furthermore, each of these statements was made available to the defense for purposes of cross-examination during Brandley's trial. The defense was free to exploit any inconsistency it felt was significant or, conversely, to exploit consistencies it felt established evidence of "coaching." There is, thus, no factual support for the majority's legal conclusion that the walk through somehow produced "irreparably mistaken" testimony.

Third, even if janitor Peace's claim that he was intimidated and abused by Ranger Styles is true, this circumstance is not material in the constitutional sense. The unrefuted record shows that Peace told Ranger Styles the same facts that he disclosed in his prior statement to the Conroe police and in his testimony at Brandley's trial. Even at the evidentiary hearing conducted during state habeas proceedings, Peace maintained that his prior statements and testimony were true.[7] Although Ranger Styles' conduct,

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testify at Brandley's second trial, which resulted in his conviction, and thus the alleged intimidation by Ranger Styles could not possibly have affected the outcome of Brandley's trial.

[7]Only by bootstrapping the habeas court's acceptance of newly discovered evidence, in the form of the recanted testimony of janitors Sessum and Acreman (the latter of whom recanted his recantation), does the majority reach its apparent conclusion that Peace's testimony must also have been perjured. The record, however, simply does not support a conclusion that Ranger Styles may have caused this to happen, if it did. The majority also suggests that the State "knowingly used perjured testimony" of Peace during the trial, although this claim was never raised by Brandley, and the record is devoid of any evidence that any law enforcement

(footnote continued on next page)

if true, is deserving of condemnation, as found by both the majority and the dissent, Brandley has not and cannot demonstrate a reasonable probability that the outcome of his trial would have been different had that conduct been exposed to the jury. Indeed, the majority opinion did not pretend to make such a finding.

Moreover, Peace's statement to Ranger Styles, that Gary Acreman reported seeing Brandley "having fun with a good looking girl," is certainly not materially favorable to the defense. This information is plainly inculpatory, not exculpatory of Brandley, as it represents an apparent eye witness account of the onset of the very crime for which he was convicted. Furthermore, the record of the trial reflects that the defense was provided with a copy of Ranger Styles' offense report for purposes of cross-examination, that the report contained an account of the statement by Peace, and that the defense, wisely, chose not to inquire into this area.

Fourth, no due process error was occasioned by the failure of the police to obtain, and the prosecutor's resistance to defense efforts to obtain, hair samples from the other janitors who were present in the high school on the date of the murder. According to Brandley, as related in his sworn testimony, those janitors were not in the building when Cheryl Fergeson was killed, and there was no probable cause or even reasonable suspicion that any one of the other janitors participated in the offense. A number of hairs and hair fragments, caucasian and negroid, were found on the

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(footnote continued from previous page)
officials or prosecutors knew of the alleged perjury. Judge Campbell's dissenting opinion, however, thoroughly demonstrates the invalidity of this suggestion. *Ex parte Brandley*, 781 S.W.2d at 924 n.12 (Campbell, J., dissenting) (Appendix A at A-96-97).

deceased's body and on her clothing. The only hairs that had been forcibly removed, and which were therefore pertinent to the investigation, were negroid and matched Brandley's hairs. A hair sample was obtained from Peace, as he was apart from the other janitors during part of the morning that the crime occurred and he discovered the body. Peace was excluded as a possible donor. The presence of caucasian hair does not in any way exculpate Brandley but, at best, suggests that Brandley was not the sole participant in the rape and murder of Cheryl Fergeson.

Fifth, the destruction of vaginal swabs containing semen samples cannot possibly have denied Brandley access to constitutionally material exculpatory evidence. The swabs, taken from the deceased during autopsy, were not destroyed by Montgomery County officials but by the Harris County Medical Examiner's Office during the regular course of its business; the Medical Examiner testified that material on the swabs would not have been available for further testing because it was consumed during the tests that his office did perform.[8] Although the swabs were not tested for the presence of factors that can identify the blood group of the donor of spermatozoa, other physical evidence was subjected to such testing; the results of those tests did not exculpate Brandley. Specifically, semen stains were recovered from the

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[8]Slides were made utilizing material from the swabs. At the request of Brandley's habeas counsel, these slides, which had been preserved, were sent to Lifecodes so that they could be subjected to newly developed DNA testing. The fact that Brandley presented no testimony at the evidentiary hearing regarding the results of the testing indicates that the material on the slides possessed no exculpatory value. In any event, the Second Circuit refused to find a due process violation, in a case presenting virtually indistinguishable facts, absence a showing of bad faith. *Colon v. Kuhlman*, 865 F.2d 29 (2nd Cir. 1988).

panties of the victim and from a mat found in the auditorium loft where her body was discovered. Scientific testing revealed sperm and blood factors A and H on the panties and the mat, consistent with the attacker having either type "A" or type "O" blood; testing for subgroups was inconclusive. Brandley has type "O" blood. Even sheer speculation cannot yield a conclusion that the swabs might have yielded evidence favorable to Brandley, much less evidence that might be expected to play a significant role in his defense. Brandley's lack of access to the swabs, therefore, was not a violation of due process.

Finally, the court below found that the State failed to disclose to the defense that Cheryl Bradford informed the police that she saw two white men rushing through the high school gymnasium near the time Cheryl Fergeson disappeared[9]. However, the unrefuted testimony at the evidentiary hearing establishes that the place where Bradford saw the two

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[9]The majority states that Bradford's "descriptions of the two men matched the height, weight and hair color characteristics of the pair now accused by Sessum as having committed the murder, Gary Acre.man and James Dexter Robinson." *Ex parte Brandley*, 781 S. W.2d at 891 (Appendix A at A-10). In making this assertion, the 2majority has flatly misstated the record. The *only* description gi$ven by Bradford of either of the two men was that *one* of them was "thin, average built." Evidentiary Hearing Transcript (R. VI - 102).

Brandley proffered this testimony and argued in his brief that the failure of the police to follow this "lead" (though who knows what the police were supposed to do with it) was evidence of an impermissible "blind focus" in the police investigation. The court below, however, found that this was exculpatory, that it was not disclosed to the defense, and that, therefore, Brandley's due process rights were infringed in contravention of *Brady v. Maryland*, 373 U.S. 83 (1963). *Ex parte Brandley*, 781 S.W.2d at 893 (Appendix A at A-14).

men was not near any place in the school that might permit access to the auditorium where Cheryl Fergeson's body was found. Even if the two men participated in the crime, the evidence still placed Brandley at the scene, apart from the other janitors, and Brandley admitted as much in his statement and grand jury testimony. Brandley was the only black man at the school who could have been the donor of the negroid hairs found on the deceased's body. By his own admission, Brandley was the only person at the school on the morning of the murder who had access to the locked auditorium in which the deceased's body was found. That someone else might have participated in the crime along with Brandley does not exculpate him and could not have provided an otherwise nonexistent reasonable doubt in the minds of jurors.

It is clear that the circumstances, even as represented by the majority, do not in any way satisfy the materiality criterion established by this Court in "access to evidence" cases. Although the Court of Criminal Appeals purported to apply a "totality of the circumstances" analysis, it did not even attempt to make a finding of materiality; rather, the majority leapt in a single bound from the conclusion that information or evidence was exculpatory to a finding that Brandley was entitled to relief. The majority made no attempt to explain how the disclosure to the defense of the evidence discussed above even remotely could have affected the outcome of Brandley's trial. Following *Ex parte Brandley*, it appears that in Texas, the cumulation of meritless claims can equate to a due process violation. The utter failure of the Court of Criminal Appeals to apply the analysis required by this Court in evaluating "access to evidence" claims requires reversal of its decision and provides a compelling reason for this Court to exercise its certiorari jurisdiction.

B. The Due Process Clause requires only a fair investigation, not a flawless one.

Apparently recognizing that Brandley was not entitled to relief under established due process theories, the Court of Criminal Appeals imposed upon the State, pursuant to an overly broad interpretation of the Due Process Clause, an obligation to conduct a pretrial investigation that does not focus solely on the accused to the exclusion of other leads or suspects, *regardless* of the fact that the great weight of the available evidence points only to the accused. This interpretation has apparently created a new category of due process error which can be characterized as "ineffective assistance of police."[10] This Court, however, has consistently held that the Due Process Clause has limited operation, and that the category of infractions that violate the concept of "fundamental fairness" should be defined very narrowly. *Dowling v. United States*, ___ U.S. ___, ___, 110 S.Ct. 668, 674 (1990).

> Judges are not free, in defining "due process," to impose on law enforcement officials their "personal and private notions" of fairness and to "disregard the limits that bind judges in the judicial function."

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[10]As succinctly noted by Judge Campbell in his dissent, "[b]y discussing these points the majority does not clarify this case by providing circumstantial evidence of a generally slipshod investigation. Instead, it changes the opinion's focus from whether the pretrial investigative procedures were constitutional to whether they were, in some subjective sense, 'good.' Our duty is neither to castigate nor praise the State's investigation in this case. Our job is limited to looking for constitutional error." *Ex parte Brandley*, 781 S.W.2d at 918 n.5 (Campbell, J., dissenting) (Appendix A at A-81).

United States v. Lovasco, 431 U.S. 783, 790 (1977), *quoting Rochin v. California*, 342 U.S. 165, 170 (1952).

The basic underpinning of the decision of the majority of the court below is that, in its opinion, the police could have and should have done a better job than they did. This holding, indeed this perception, is a classic example of judges "impos[ing] on law enforcement officials their 'personal and private notions' of fairness," conduct condemned by this Court in *Dowling*, *Lovasco*, and *Rochin*. An inept, incomplete, incompetent, or otherwise "flawed" investigation, however, invariably benefits the defendant, not the State. The failure of the police to investigate potential leads or to conduct available scientific tests on physical evidence is a circumstance that can be effectively exploited, and was exploited in Brandley's trial, in an effort to create reasonable doubt.

The Court of Criminal Appeals attempts, inappropriately and unsuccessfully, to relate the alleged failings of the investigation and the alleged resulting "blind focus" to the decisions of this Court relating to impermissibly suggestive lineups, *e.g.*, *Foster v. California*, 394 U.S. 440 (1969), and the government's knowing use of or failure to correct perjured testimony, *e.g.*, *Napue v. Illinois*, 360 U.S. 264 (1959); *Mooney v. Holohan*, 294 U.S. 103 (1935). However, nothing in the record of this case implicates any of these principles.

The only decisions of this Court that are even arguably implicated by the perceived deficiencies of the investigation in this case are *Youngblood* and its predecessors, *e.g.*, *California v. Trombetta*, 467 U.S. 479 (1984), which hold, in essence, that the failure to preserve evidence, and arguably by implication to col-

lect it in the first place, *see e.g. Miller v. Vasquez*, 868 F.2d at 1120 (following *Youngblood*, state's good faith failure to collect potentially exculpatory evidence does not violate due process); *Johnson v. Pittman*, 731 F.2d 1231, 1234 (5th Cir. 1984) (State under no constitutional duty to pursue every possible avenue of investigation potentially favorable to the defense), does not violate due process unless the defendant demonstrates by means other than speculation that such evidence is exculpatory and that bad faith police conduct resulted in its unavailability. Neither of these tests is met by the facts relied upon by the Court of Criminal Appeals in this case.

The evidence developed in the early phases of the investigation of Cheryl Fergeson's rape and murder immediately pointed to Brandley as the perpetrator. As the Court of Criminal Appeals noted in its opinion on the direct appeal of Brandley's conviction, the evidence did not even "*suggest* that someone other than [Brandley] committed the offense." *Brandley v. State*, 691 S.W.2d at 704 (emphasis in original) (Appendix D at D-8). Indeed, Brandley's own statements to the police, his testimony before the grand jury that returned the indictment against him, and his testimony at his first trial that ended with a deadlocked jury (all part of the record that *Agurs* requires a reviewing court to consider), establish that there was never any reason for the police to consider that other janitors who were present at the school on the morning of the murder had anything to do with the crime. Brandley's own statements indicate that he was the only person, at the time of the crime, who was in the area of the building where the victim was murdered, and that he was the only person at the school at the time of the crime who had keys to the locked auditorium where the body was found. Additionally, negroid hairs matching Brandley's were

found on the victim's body; Brandley was the only black man identified as having been anywhere near the scene of the crime. All of the other janitors who were working with Brandley were out of the building at the time of the crime, according to not only their statements but Brandley's statements and sworn testimony as well.

In light of these circumstances it was perfectly reasonable for the police to have "focused" on Brandley to the exclusion of other potential suspects. While it might have been possible for the investigation to have tied up every conceivable loose end, nothing in this Court's precedent requires such an undertaking. In this case, none of the "leads" that the court below urges police should have pursued could objectively have been expected to uncover evidence that might play a significant role in Brandley's defense.[11] *See Trombetta*, 467 U.S. at 488-89. *Youngblood* and its predecessors

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[11]At best, the presence of a caucasian hair on the victim's body, along with hairs matching Brandley's, suggests that Brandley was not the only participant in the rape and murder of Cheryl Fergeson. That inference, even if credited by a fact finder, does not lessen Brandley's guilt or exculpate him in any way. As discussed above, although vaginal swabs were not retained and were not subjected to testing that could reveal the blood type of the donor, other physical evidence from the scene, including the victim's underwear, was subjected to such testing. Those tests were consistent with the assailant having Type "O" blood, and Brandley's blood is Type "O."

Likewise, Cheryl Bradford's statement--that she saw two white men, one of whom she could very generally describe with respect to build, walking quickly through the high school gymnasium--is not exculpatory to Brandley. Any failure of the police to perceive the remote exculpatory value of Bradford's information was not unreasonable. Certainly, Bradford's statement was not material in any constitutional sense; the information available to the police uniformly revealed, without contradiction even from Brandley, that Brandley was the only person who had access to the locked auditorium where the victim's body was found.

teach that, in the absence of bad faith, the human failings of police do not provide a basis for a reviewing court to find a due process violation.

III.

THE COURT BELOW ERRED BECAUSE ITS RULING AMOUNTS TO A "NEW" CONSTITUTIONAL RULE, WHICH MAY NOT BE ANNOUNCED ON COLLATERAL REVIEW.

This Court has held that, with two limited exceptions, "new" rules of federal constitutional law are not to be announced or applied on collateral review of a conviction. *Penry v. Lynaugh*, 492 U.S. ___, ___, 109 S.Ct. 2934, 2944 (1989) (capital case). A decision announces a "new" rule, for retroactivity purposes, "'if the result was not *dictated* by precedent existing at the time the defendant's conviction became final.'" *Id.*, *quoting Teague v. Lane*, 489 U.S. ___, ___, 109 S.Ct. 1060, 1070 (1989) (emphasis in original). This principle ensures that "reasonable, good faith interpretations of existing precedents made by state courts" are validated, even though the interpretations ultimately conflict with later Supreme Court decisions. Thus, a case announces a new rule even if the outcome is "governed" by, or within the "logical compass" of, existing precedent, unless the result was so dictated by existing precedent that reasonable jurists would not disagree with the result. *Id.*; *Butler v. McKellar*, ___ U.S. ___, ___, 110 S.Ct. 1212, 1217 (1990).

As discussed above, the decision of the court below applied a new rule of federal constitutional law by imposing upon the State an unprecedented obligation to pursue and disclose to the defense all "leads," and to collect, scientifically test, and preserve all evidence; the scope of this obligation is not limited by

any consideration of materiality, bad or good faith police conduct, or even reasonableness. The holding of the Court of Criminal Appeals conflicts with the decisions of this Court, and it certainly was not dictated by precedent existing at the time Brandley's conviction became final.[12] *E.g.*, *California v. Trombetta*, 467 U.S. at 489 (To meet materiality standard limiting government's duty to preserve evidence, "evidence must both possess an exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means."); *accord United States v. Dela Espriella*, 781 F.2d 1432 (9th Cir. 1986) (applying *Trombetta* materiality criterion); *Johnson v. Pittman*, 731 F.2d 1231 (5th Cir. 1984) (State under no constitutional duty to pursue every possible avenue of investigation potentially favorable to the defense); *United States v. Hoppe*, 645 F.2d 630 (8th Cir. 1981) (absent showing of bad faith, case agent's destruction of original version of her notes did not violate due process); *United States v. Wander*, 601 F.2d 1251 (3rd Cir. 1979) (FBI agent's destruction of evidence not violative of due process because the defendant failed to demonstrate the materiality of the destroyed evidence).

Although the Constitution neither mandates nor proscribes retroactive application of new constitutional rules, *Linkletter v. Walker*, 381 U.S. 618, 629 (1965), this Court's determination of the retroactivity question is binding upon state courts. For example, in *Griffith v. Kentucky*, ___ U.S. ___, 107 S.Ct. 708 (1987), the Court determined that *Batson v. Kentucky*, 476 U.S. 79

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[12]Brandley's conviction became final on August 5, 1985, when the time for petitioning for certiorari review of his direct appeal expired. *Allen v. Hardy*, 478 U.S. 255, 258 n.1 (1986). Brandley's conviction was affirmed on direct appeal on May 8, 1985, with rehearing denied on June 6, 1985 (Appendix D).

(1986), should retroactively apply to all defendants whose convictions were not final at the time *Batson* was decided. Because Griffith's conviction was not final, the Court remanded his case to the Supreme Court of Kentucky so that his claim of prosecutorial discrimination in the use of peremptory challenges could be analyzed under the new *Batson* standard.

Likewise, a state court should not be free on collateral review to apply a new rule of federal constitutional law, where neither this Court nor any other federal court could retroactively apply that rule. Such a situation would violate "the principle of treating similarly situated defendants the same." *Griffith v. Kentucky*, ___ U.S. at ___, 107 S.Ct. at 713. Further, the new rule of federal constitutional law is itself an unwarranted federal intrusion, whether imposed by a federal court or by a state court under the constraints of its interpretation of federal constitutional principles. The state courts are free, of course, to retroactively apply state constitutional and statutory provisions in a manner that affords greater protection than the federal Constitution; but in the instant case, the Court of Criminal Appeals was not presented with and did not decide a claim under state law.

The new rule applied by the court below does not place certain conduct or persons beyond the government's power to proscribe or punish. *See Penry v. Lynaugh*, 492 U.S. at ___, 109 S.Ct. at 2952. Likewise, the new rule announced by the Court of Criminal Appeals does not constitute a bedrock procedural rule that is necessary to ensure fundamental fairness or accurate factfinding. *See Teague v. Lane*, 489 U.S. at ___, 109 S.Ct. at 1077. Indeed, by imposing upon the State an obligation to pursue certain "leads" and collect and preserve certain evidence, without regard to any of the materiality standards typically applied in access to

evidence cases, the court below announced a new rule that goes far beyond what is necessary to ensure an accurate and fundamentally fair trial. Hence, the "new" rule of federal constitutional law announced and applied in Brandley's state habeas proceeding should not have been given retroactive application in that collateral attack on a final conviction.

CONCLUSION

For these reasons, the State respectfully requests that the writ of certiorari to the Court of Criminal Appeals issue.

Respectfully submitted,

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89-1887

(2)

Supreme Court, U.S.
FILED
MAY 29 1990
JOSEPH F. SPANIOL, JR.
CLERK

No._____

IN THE
UNITED STATES SUPREME COURT
OCTOBER TERM, 1989

THE STATE OF TEXAS,
Petitioner,

v.

CLARENCE LEE BRANDLEY,
Respondent.

On Petition For Writ Of Certiorari
To The Texas Court Of Criminal Appeals

APPENDIX A

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APPENDIX A

Ex parte Clarence Lee Brandley, Applicant.

No. 70719.

Court of Criminal Appeals of Texas,
En Banc.

Dec. 13, 1989.

Rehearing Denied Jan. 17, 1990.
[781 S.W.2d 886]

Before the court en banc.

OPINION

BERCHELMANN, Judge.

This is an application for writ of habeas corpus. Tex. Code Crim. Proc. Ann. art. 11.07. Applicant was twice tried for the capital murder of Cheryl Fergeson. Applicant's first trial ended in a mistrial when the jury was unable to reach a verdict. In his second trial, applicant was found guilty as indicted. On direct appeal, we affirmed applicant's conviction holding, among other things, that the evidence was sufficient to support the jury's verdict. *Brandley v. State,* 691 S.W.2d 699 (Tex.Cr.App. 1985). While the record on direct appeal supports that holding, the evidence adduced pursuant to this application raises other constitutional issues irrelevant to the sufficiency question.

Applicant's petition for writ of habeas corpus raises seven grounds, one of which alleges that the State's investigative procedure violated his right to due process of law and a fundamentally fair trial. One of

the facts underpinning that assertion demonstrates that the State failed to provide appellant's counsel with potentially exculpatory information in the State's possession that two men were witnessed near the scene of the crime shortly after the victim was last seen alive.

Because applicant alleged claims of constitutional dimension based upon controverted, previously unresolved facts which are material to his confinement, we ordered the trial court to hold a hearing pursuant to this application. *See* Tex. Code Crim. Proc. Ann. art. 11.07, Sec. 2. In *Ex parte Adams,* 768 S.W.2d 281 (Tex.Cr.App. 1989), less than a year ago this Court unanimously found that Adams's application for writ of habeas corpus, alleging a due process violation based upon facts requiring an evidentiary hearing, was properly before us. This Court has long recognized the cognizibility of due process claims in original habeas corpus proceedings. *Ex parte Bush,* 166 Tex.Cr.R. 259, 313 S.W.2d 287 (1958).

The trial court held an extensive hearing pursuant to this application and entered findings of fact and conclusions of law favorable to applicant. Therein the judge presiding over the hearing concluded that applicant was denied a fair trial and due process of law. Commenting upon the testimony adduced at the hearing, the trial court stated:

> The litany of events graphically described by the witnesses, some of it chilling and shocking, leads me to the conclusion the pervasive shadow of darkness has obscured the light of fundamental decency and human rights. I can only sadly state justice has been on trial here, but of more significance, injustice has been on trial.

Applicant alleges that the State's pretrial investigative procedures were "so impermissibly suggestive of applicant that it created false testimony calculated to manufacture circumstantial evidence against applicant in violation of his right to due process and a fundamentally fair trial." The trial court found that the State failed to "conduct a proper investigation," and that the investigation had a "blind focus" which ignored leads to evidence inconsistent with the "premature conclusion that [applicant] had committed the crime." The trial court's conclusions of law state that the investigative procedure was "so impermissibly suggestive that false testimony was created, thereby denying [applicant] of due process of law and a fundamentally fair trial."

While this Court is not bound by the findings of a trial court in a habeas corpus proceeding, *Ex parte Bates,* 640 S.W.2d 894 (Tex.Cr.App. 1982), where the trial court's findings are supported by the record, they should be considered, if not accepted. *Ex parte Adams,* 768 S.W.2d at 288; *Ex parte McCormick,* 645 S.W.2d 801 (Tex.Cr.App. 1983). In *Ex parte Turner,* 545 S.W.2d 470 (Tex.Cr.App. 1977), we held that although this Court has the ultimate power to decide matters of fact in habeas proceedings, generally if the trial court's findings are supported by the record, they should be accepted by this Court.[1]

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[1]In his dissenting opinion to this cause, the Presiding Judge disregards the overwhelming evidence supporting the trial court's findings in an impassioned attempt to reject those findings. Instead of looking at the evidence in support of the findings, that opinion attempts to contradict them by citing snippets of grand jury and trial testimony, at times out of context and other times in a less than complete fashion, in addition to offering personal gratuitous obserations. Of course, this is not, nor has it ever been, the appropriate standard of review of a trial court's findings. *See,* for example, Judge Duncan's concurring opinion, *infra,* for a more detailed explanation of this problem.

I.

Set forth below is a summary of the findings of fact, entered by the judge presiding over the habeas hearing, which are supported by the record.

Applicant was indicted, convicted and sentenced to death for the sexual assault and murder of Cheryl Fergeson. Fergeson's death occurred on Saturday, August 23, 1980, during a girls' volleyball tournament held at Conroe High School. The fall semester was scheduled to begin on Monday, August 31. The authorities announced to the public that a suspect would be arrested prior to the commencement of classes. Texas Ranger Wesley Styles was called in to head the investigation. Styles began his investigation on the evening of Thursday, August 28, three days before classes were scheduled to resume. The next day, prior to interviewing any witnesses, Styles arrested applicant, a janitor of the high school. On Saturday, August 30, Styles arranged for three other Conroe High School janitors, Gary Acreman, Sam Martinez and John Sessum, to meet at the high school. Styles did not interview them separately, but instead conducted a "walk through" wherein the janitors were walked through the sequence of events of the day of the murder, and were questioned in each others presence. Gary Acreman did most of the talking at the walk through.

John Sessum testified at applicant's first trial. His testimony at trial was consistent with the story generated by the walk through, that is, that applicant approached the stairwell after the victim walked up the stairs and headed into the restroom. At the evidentiary hearing, however, Sessum admitted that he committed perjury at applicant's first trial and lied in his statement to the authorities because he was in fear of both Acreman and Styles. He testified at the hearing

that Acreman talked to the victim as she approached the stairwell. Acreman followed her up the stairs, talked to her at the top of the stairs, and then grabbed the victim. Acreman was accompanied by a former janitor of the high school, later identified as James Dexter Robinson.[2] The victim screamed, "No" and "Don't," and cried for help. Contrary to his prior statements, Sessum testified that applicant did not arrive until five or ten minutes after the girl was accosted.

Sessum further testified that when Acreman drove him home the day of the murder, Acreman warned him that if Sessum told anyone there would be "trouble" for Sessum. Acreman repeated his warning to Sessum prior to the "walk through." When Sessum tried to tell Styles about Acreman, Styles threatened to arrest Sessum if Sessum did not cooperate with the walk through. Sessum testified that in 1987 he was assaulted by an unknown man who was inquiring about Sessum implicating Acreman in the death of the victim. The trial court found Sessum's testimony at the evidentiary hearing credible.

Gary Acreman testified at both of applicant's trials and the evidentiary hearing. His testimony at

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[2]Brenda Medina, the woman with whom Robinson lived at the time of the murder, testified at the evidentiary hearing that the day of the murder Robinson did not return home until after midnight. Robinson awakened Medina and stated that he had to leave the state because he killed a girl, but that he had hidden the girl's body so well that no one would find her until he was out of town. Robinson left the state early that morning, leaving behind his blood stained tennis shoes. The record reflects that Medina first told this information to her attorney in 1986. Medina's attorney informed the District Attorney's Office of the extra judicial confession. When Medina's attorney learned that the District Attorney's office failed to inform defense counsel of this information, he notified defense counsel about Robinson's confession.

trial was consistent with the story generated by the walk through; viz: the victim walked up the stairs and toward the restroom, followed shortly thereafter by applicant. At the hearing, applicant entered into evidence two videotaped statements made by Acreman in which Acreman proclaimed applicant's innocence and stated that James Dexter Robinson followed the victim up the stairs, Acreman heard the girl yell, "No," and Acreman saw Robinson grab the girl and drag her into the restroom as she screamed for help. In the videotaped statements, Acreman stated that Robinson threatened him into lying about the murder. Acreman repeated again and again on the videotaped statements that applicant had nothing to do with the murder and that applicant was "being railroaded."

At the hearing, Acreman recanted the statements on the videotapes. After much vacillation, Acreman admitted that Robinson was, in fact, at the school that day. Acreman admitted that the statements generated by the walk through were incorrect in that they failed to acknowledge that Acreman spoke to the victim shortly before her death. Acreman claimed that the conversation completely slipped his mind until the evidentiary hearing held seven years after the murder. Acreman testified to a new found memory that he left the other janitors after speaking with the victim, despite his trial testimony that he, Sessum and Martinez were together when the girl was murdered.

The third janitor attending the walk through was Sam Martinez. Prior to the walk through, Martinez gave a statement with a differing version of events of the day of the murder. Two days after the murder, Martinez gave a statement that the victim walked up a stairwell and headed towards the restroom after applicant had come up the stairs. After Styles' walk through, Martinez changed his story to coincide

with walk through version of events; that is, applicant approached the stairwell after the victim walked up the stairs and headed into the restroom. Martinez explained the inconsistencies between the two statements by stating that the walk through "helped me a whole lot." At the evidentiary hearing, Martinez changed the story produced by the walk through by stating that the victim asked the janitors where the restroom was located and that Acreman spoke to the victim. Prior to the evidentiary hearing, Martinez, who gave two statements to the police and testified at both of applicant's trials, never admitted this conversation took place. Martinez also changed the walk through version of events to which he testified at applicant's trials by stating that Acreman spent approximately thirty minutes away from Martinez and Sessum shortly after the victim went into the restroom.

Sessum, Acreman and Martinez signed written statements following the walk through, but Styles did not supervise the taking of the statements. Styles testified that he had no idea whether the statements were accurate, and could offer no explanation why Sessum's statement was not signed until one month after the walk through. The trial court noted that the three written statements taken immediately following the walk through were consistent as to the critical sequence of events and the critical time frames.

Henry Martin Peace, the janitor who discovered the victim, testified on behalf of the State at both of applicant's trials. Peace circumstantially implicated applicant by stating that applicant repeatedly ordered Peace to search the loft where the girl's body was found, until Peace ultimately discovered the victim.

At the hearing Peace stated that Styles arrived at Peace's home one night and forced Peace against the

wall, choking Peace by twisting the chain Peace wore around his neck. Peace, a man the trial court noted as being under five foot tall, was taken to the Cleveland Police Station until 1:30 in the morning. In route, Styles threatened to "blow" Peace's brains out. When Peace complained of Styles' treatment to the District Attorney's Office, Peace was told that the office would "take care of it." Later the members of the District Attorney's Office told Peace he was "hallucinating" that Styles had manhandled him. Peace testified that he continues to fear Styles.

Peace was not allowed to leave the police station until he signed a written statement, despite his inability to read or write. Peace asked that a family member be permitted to read the statement to him before he signed it, but the police denied Peace's request. On another occasion, Peace was told by a police officer that Peace was too small to have committed the sexual assault and murder, but that "the nigger" [referring to applicant] was big enough to have committed the crime; therefore, "the nigger was elected."

The trial court found that the murder investigation was so contrived that it created false testimony and that the investigation failed to follow any leads which did not comport with the preconceived, premature notion that applicant committed the murder. Styles admitted at the evidentiary hearing that before he arrived in Conroe and prior to interviewing any witnesses, applicant was his only suspect. Styles maintained this blind focus despite the fact that a Caucasian pubic hair, not belonging to the victim, was found near the victim's vagina. The State resisted all efforts to obtain hair samples for comparison from the three janitors who saw the victim moments before the

assault.[3] When pressed for a reason why he did not want to obtain a hair sample from Acreman to compare with the Caucasian pubic hair found near the victim's vagina, Styles testified at the evidentiary hearing, "Let's say I didn't do it and it wasn't done, and why it wasn't done, I don't know."

Additionally, the State resisted all attempts to obtain blood samples from Acreman, Martinez and Sessum despite finding blood inconsistent with applicant's blood type on the victim's shirt. Type A blood was found on the shirt, and although the victim had Type A blood, there were no lacerations to any part of her body, indicating that the blood may have originated from the perpetrator. Applicant has Type O blood. Not until years after the murder, when the Texas Attorney General's Office began to investigate the validity of applicant's conviction, did the State finally obtain samples of blood from Acreman and Robinson. Both men have Type A blood.[4]

Moreover, after the autopsy discovered the existence of semen in the victim's vagina, the State failed to run an analysis of the sample to determine the blood type of the donor. Dr. Joseph Jachimczyck, now

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[3]It would be futile to obtain samples for comparison today, for the exhibit containing the Caucasian hair became missing while the record was being prepared for direct appeal.

[4]The blood samples finally obtained from Acreman and Robinson cannot be compared with the blood found on the victim's shirt because the blood stained shirt also became missing when the record was being prepared for direct appeal.

Notwithstanding the Presiding Judge's assertion to the contrary in his dissenting opinion, these facts regarding the bloody clothing are uncontradicted by the record and the parties in this cause.

the Harris County Medical Examiner, testified at the evidentiary hearing that his office did not test for the blood type of the donor, and that he did not know whether the samples were given to the Conroe Police Department. A detective from the Sex Crimes Unit of the Homicide Division of the Houston Police Department testified at the hearing that it was standard police procedure in 1980 to preserve the vaginal swabs taken in sexual assault investigations, and that there is no justification to discard the swabs because they can scientifically exclude suspects based on blood typing, Rh factor and other genetic characteristics of the donor of the spermatozoa.

Likewise, the State failed to investigate a lead from Cheryl Bradford, a volleyball participant. Bradford testified at the evidentiary hearing that the day of the murder, she passed the victim in the hallway as Bradford returned from the restroom. Bradford thereafter proceeded to the gymnasium and began warming up for the game. Twenty to thirty minutes after last seeing the victim alive, Bradford observed two white men rushing through the gymnasium. She recalled seeing the men because there were no males attending the volleyball tournament. Her descriptions of the two men matched the height, weight, and hair color characteristics of the pair now accused by Sessum as having committed the murder, Gary Acreman and James Dexter Robinson.[5] After the victim's body was discovered, Bradford told her volleyball coach about the men. Bradford and her coach contacted the Conroe

[5]Bradford's statements undermine the State's theory of the case that applicant was the only janitor whose presence was unaccounted for at the time of, and following, the murder. Additionally, this information conflicts with the now recanted trial testimony of Acreman, Martinez and Sessum that they were exclusively in each other's company after the girl entered the restroom.

Police Department with the lead, but the police "were not real interested in [her] information and were in a rush to get [her] off the phone." The police never contacted Bradford for further information, nor did any government agency ever inform defense counsel of the incident. Eight years after the murder, Bradford saw a televised program questioning the validity of applicant's conviction. She got "chills" when she saw a televised picture of James Dexter Robinson, although unable to identify Robinson as one of the men she saw rushing through the auditorium. She subsequently recontacted the authorities about witnessing the men. Trial counsel for applicant were never informed about this information.

Styles also failed to investigate a lead given by Peace after Styles conducted the walk through with the other janitors. Peace informed Styles that the day of the murder Acreman re-entered the high school alone and stated that applicant was "having fun with a good looking girl." Despite the prospect that either Acreman may have witnessed the offense or a related act, or that Acreman may have floated a false story about applicant, Styles never asked Acreman about the meaning of the statement. Regarding his failure to investigate the statement, Styles testified, "I might've should have asked [Acreman], but I didn't." He also stated that he did not investigate the statement because it was "hearsay."

II.

Where the State's investigative procedure is so improper, it may result in a denial of an accused's rights to due process of law. *Foster v. California,* 394

U.S. 440, 89 S.Ct. 1127, 22 L.Ed.2d 402 (1969); *Dispensa v. Lynaugh,* 847 F.2d 211, 218 (5th Cir. 1988). In *Foster,* the Supreme Court held that where the State orchestrated an identification procedure "so unnecessarily suggestive and conducive to irreparable mistaken identification" of an accused, the State's conduct may amount to a denial of due process, judged by the totality of the circumstances. *Id.,* 394 U.S. at 442, 89 S.Ct. at 1128, citing and quoting *Stovall v. Denno,* 388 U.S. 293, 302, 87 S.Ct. 1967, 1972, 18 L.Ed.2d 1199 (1967).

Although *Foster* involves impermissible State conduct in an identification procedure, the Due Process Clause of the Fourteenth Amendment is not limited to the State's action in that narrow context. For example, due process is not satisfied where the State contrives a conviction "through the pretense of a trial which in truth is but used as a means of depriving a defendant of liberty." *Mooney v. Holohan,* 294 U.S. 103, 112, 55 S.Ct. 340, 342, 79 L.Ed. 791 (1935) (State's use of perjured testimony). Nor is due process satisfied where the State fails to correct unsolicited perjury. *Napue v. Illinois,* 360 U.S. 264, 269, 79 S.Ct. 1173, 1177, 3 L.Ed.2d 1217 (1959), nor where the State suppresses evidence favorable to the accused. *Brady v. Maryland,* 373 U.S. 83, 87, 83 S.Ct. 1194, 1196-97, 10 L.Ed.2d 215 (1963). Likewise, where the State's conviction is based in part upon the introduction of a coerced confession, a defendant's right to due process is violated, *Rogers v. Richmond,* 365 U.S. 534, 544, 81 S.Ct. 735, 741, 5 L.Ed.2d 760 (1961), and where the State conceals a material witness whose testimony is shown to create a reasonable doubt of guilt that did not otherwise exist, there is also a deprivation of due process. *Hernandez v. Estelle,* 674 F.2d 313 (5th Cir. 1981).

Although our review of the record supports the trial court's finding that the State's investigation was flawed, we must now determine whether these facts support the trial court's conclusion of law that the investigation lead to a denial of applicant's right to due process and fundamental fairness. We look to the "totality of the circumstances" to make that determination. *Ex parte Adams,* 768 S.W.2d at 293; *Foster,* 394 U.S. at 442, 89 S.Ct. at 1128.

We note at the outset, as we did on direct appeal, that applicant's conviction is based entirely on circumstantial evidence. *Brandley,* 691 S.W.2d at 701. State misconduct is more likely to affect the outcome of the trial based upon circumstantial evidence than one in which there is direct evidence, untainted by State misconduct, linking a defendant to the crime.[6]

The State's suppression of Bradford's information that she saw a man meeting Acreman's description near the scene of the crime shortly after the victim was attacked undermines Acreman's now recanted testimony that he was in a different building with the other janitors at the time in question. At the very least, it establishes that men other than applicant were near the scene of the crime shortly after the victim was last seen alive. Given Bradford's hearing testimony that she saw no men attending the volleyball tournament at the time in question, this information becomes more significant by establishing other suspects, if not impeaching

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[6]For example, where a defendant alleges a due process violation based upon the State's failure to inform him of potentially exculpatory evidence, the "materiality" requirement focuses upon whether the suppressed evidence might have affected the outcome of the trial. *U.S. v. Agurs,* 427 U.S. 97, 96 S.Ct. 2392, 2398, 49 L.Ed.2d 342 (1976). *See also U.S. v. Bagley,* 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985).

Acreman's testimony regarding his whereabouts.[7]

A review of applicant's pleadings reflects that applicant, albeit inartfully, alleges that this evidence supports a due process claim under *Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 which prohibits State suppression of "evidence favorable to an accused ... where the evidence is material either to guilt or to the punishment, irrespective of the good faith or bad faith of the prosecution," *Id.,* at 87, 83 S.Ct. at 1196. In *United States v. Bagley,* 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985), the Supreme Court held that the due process requirements addressed in *Brady, supra,* applied to the suppression of impeachment evidence, and where such evidence was suppressed, a new trial must be granted where the confidence in the outcome of the trial is undermined. *Bagley,* at 683, 105 S.Ct. at 3383. To require reversal pursuant to a *Brady* claim, however, the State's suppression of evidence must be considered material. Evidence is considered material where there is a reasonable

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[7]The State urges that the District Attorney's Office was not aware of Bradford's statements to the police. However, in determing a due process violation we have declined in the past to distinguish different agencies under the same government, focusing instead upon the prosecuting team, which includes both investigative and prosecutorial personnel. *Ex parte Adams,* 768 S.W.2d at 292, citing *U.S. v. Antone,* 603 F.2d 566, 569 (5th Cir. 1979).

Additionally, any suggestion by the Presiding Judge in his dissenting opinion that Bradford's testimony at the hearing is unworthy of belief or is immaterial because it is "unsubstantiated" simply begs the question. *Ex parte Brandley,* 781 S.W.2d at 904 (McCormick, P.J. dissenting). Moreover, to imply that her testimony is irrelevant because a police officer testified at trial that there were men at the tournament is factually misleading. Bradford's testimony regarding seeing no other men concerns the time frame in which the victim disappeared. The police officer's testimony relates to a time frame hours later.

probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. *Bagley,* at 682, 105 S.Ct. at 3383 (1985).

In *United States v. Agurs,* 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976), the Supreme Court addressed the materiality requirement:

> It necessarily follows that if the omitted evidence creates a reasonable doubt that did not otherwise exist, constitutional error has been committed. This means that the omission must be evaluated in the context of the entire record. If there is no reasonable doubt about guilt whether or not the additional evidence is considered, there is no justification for a new trial. On the other hand, if the verdict is already of questionable validity, additional evidence of relatively minor importance might be sufficient to create a reasonable doubt.

Id., at 112-113, 96 S.Ct. at 2402 (footnote omitted).

In *Bagley,* 473 U.S. at 683, 105 S.Ct. at 3384, the Supreme Court instructed appellate courts to make the materiality determination "in light of the totality of the circumstances and with an awareness of the difficulty of reconstructing in a post-trial proceeding the course that the defense and the trial would have taken had the defense [been given access to the suppressed evidence]." Whether Bradford's statements to the police are analyzed pursuant to applicant's broader due process claim based upon the entire investigation, or regarding applicant's more specific due process claim under *Brady,* we are compelled to look further and consider the totality of the circumstances of the trial.

Additionally, applicant submits that the "walk through" of Acreman, Sessum and Martinez contributed to a due process violation by creating false testimony. The trial court found that the walk through served as a means of intimidating Sessum into following the story generated by the walk through, for Sessum was threatened with arrest when he attempted to inform the authorities about Acreman's involvement in the murder. The walk through undoubtedly injected false testimony into applicant's first trial, for Sessum admitted that he committed perjury at applicant's first trial. However, Sessum did not testify at applicant's second trial. Acreman and Martinez did testify at the second trial, adhering to the walk through story. Both Acreman and Martinez acknowledged at the evidentiary hearing that the walk through story is incomplete, in that Acreman did, in fact, speak with the victim shortly before she was murdered. The habeas judge found Martinez's and Acreman's explanations that they forgot Acreman's conversation with the girl, until seven years after the murder, are unworthy of belief.

Both men also recanted the walk through story and professed a new found memory at the evidentiary hearing by testifying that Acreman was not with Martinez and Sessum for a thirty minute interval after Acreman spoke with the victim. The harm resulting from the walk through story that Acreman was with the other janitors when the victim was abducted is underscored by this Court's treatment of the evidence on direct appeal. We found the evidence sufficient to support applicant's conviction holding that there were no reasonable hypotheses other than applicant's guilt, based in part upon the fact that the whereabouts of Acreman, Sessum and Martinez were accounted for at the time of the murder. *Brandley,* 691 S.W.2d at 704.

Additionally, Styles' manhandling and threats to kill the diminutive Peace, the State's star witness, taints the reliability of Peace's trial testimony. The psychological pressure exerted on Peace to circumstantially implicate applicant would potentially undermine the fact finder's confidence in the product of such coercion.[8]

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[8]Although acknowledging Peace's repeated perjury on collateral issues, the dissenting opinion surmises that the investigative procedure "did not produce any unreliable testimony" from Peace. *Ex parte Brandley,* 781 S.W.2d 904 (Campbell, J. dissenting). The record contradicts this bold assertion. Peace's hearing testimony conflicts with his trial testimony regarding Styles' mistreatment. At trial, Peace testified as follows:

> Q. [Defense Counsel] Did Ranger Styles influence you in any way on your testimony in this case?
>
> A. [Peace] No, Sir. Nobody has.
>
> * * * * * *
>
> Q. Wesley Styles--was he good to you? Treat you fair?
>
> A. He didn't mistreat me. No, Sir.

Peace's hearing testimony recounts abusive treatment which, according to Peace, was reported to the District Attorney's Office. Notwithstanding the District Attorney's knowledge of Styles' mistreatment of Peace, the State failed to correct Peace's false testimony adduced at trial. This evidence alone arguably supports yet another due process violation: The State's use of perjured testimony. *Napue v. Illinois,* 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959); *Alcorta v. Texas,* 355 U.S. 28, 78 S.Ct. 103, 2 L.Ed.2d 9 (1957). *See also Ex parte Adams,* 768 S.W.2d 281.

Moreover, Peace acknowledged at trial that the statement the police prepared for Peace, and signed by Peace despite his inability to read or write, is riddled with inconsistencies. He testified to five separate false statements in the document.

(Footnote continued on next page)

The State's refusal to obtain hair and blood samples from the three janitors who saw the victim enter the restroom creates problems of a different type. Despite evidence that a Caucasian hair, not belonging to the victim, was found on her, and despite the evidence that blood inconsistent with applicant's blood type was found on the victim's shirt, the State resisted efforts to obtain samples from Acreman, Martinez and Sessum. Because these pieces of evidence were lost in Montgomery County while the record was being prepared for direct appeal, no tests can now be performed on these items.

Absent a showing of bad faith on the part of the police, failure to preserve potentially useful evidence does not, in and of itself, result in the denial of due process of law. *Arizona v. Youngblood*, ____ U.S. ____, 109 S.Ct. 333, 337, 102 L.Ed.2d 281 (1988). However, in the case at bar, the State's apparent refusal to perform certain scientific tests on the physical evidence at hand resulted in a lack of direct evidence in this case. This lack of direct evidence buttresses applicant's claim that the error resulting from the State's other improper conduct affected the outcome of his trial.

Although any of these incidences alone might not support applicant's claim, there can be no doubt that the cumulative effect of the investigative procedure, judged by the totality of the circumstances, resulted in a deprivation of applicant's right to due process of law by suppressing evidence favorable to the accused, and by creating false testimony and inherently unreliable

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(Footnote continued from previous page)

Lastly, Peace also acknowledged committing perjury at applicant's first trial regarding Peace's display of a pistol at the high school prior to the date of the murder. Simply put, the dissenting opinion's implication that Peace's statements have been consistent is simply not supported by the record.

testimony.[9] Accordingly, applicant's conviction must be reversed.

Due process of law is the cornerstone of a civilized system of justice. Our society wins not only when the guilty are convicted but when criminal trials are fair; our system of justice suffers when an accused is treated unfairly. *Brady,* 378 U.S. at 87, 83 S.Ct. at 1197. The State's investigative procedure produced a trial lacking the rudiments of fairness. The principles of due process, embodied within the United States Constitution, must not, indeed cannot, countenance such blatant unfairness.

The violent end to Cheryl Fergeson's young life is both senseless and tragic. The end of a life so full of promise is a loss not only to her loved-ones, but also to our society as a whole. Our outrage over her murder, however, cannot justify the subversion of justice that took place during the investigation, which ultimately affected the trial of her accused perpetrator.

We therefore set aside applicant's conviction, and order applicant released to the Sheriff of Montgomery County to answer the indictment upon which applicant was convicted.

WHITE, J., concurs in the result.

DUNCAN, Judge, concurring.

I join the majority opinion; however, I write separately only to comment briefly upon the dissenting opinions. In fiscal year 1987-1988 (September 1, 1987

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[9]We hold that the error attendant to this case would not prevent the readmission of evidence upon retrial, assuming, of course, that the procedural prerequisites to its admission are met.

to August 31, 1988), this Court denied or dismissed 2,259 post-conviction applications for writs of habeas corpus. *See Texas Judicial System: 60th Annual Report* (Office of Court Administration: Austin, 1988), p. 168. These sheer numbers, if nothing else, emphasize the commitment of this Court to respect the objective and, under certain circumstances, subjective findings made by the trial court in a post-conviction habeas corpus hearing. Ten months ago, in *Ex parte Adams,* 768 S.W.2d 281 (Tex.Cr.App. 1989), this Court unanimously quoted with approval the language of *Ex parte Moore,* 126 S.W.2d 27 (Tex.Cr.App. 1939). In *Moore* the Court stated:

> Where the ruling of the trial judge depends upon the existence or non-existence of a certain fact and testimony pro and con is introduced thereon and the evidence is conflicting it becomes the duty of the trial judge to determine the issue, and unless it appears to this court that his finding was without support in the evidence, and that he had committed an error in his judgment thereon, we would not interfere with his findings thereon. *Id.,* 126 S.W.2d at 28.

The cases are absolutely legion, and I do not use that word loosely, to support the foregoing proposition. That is as it should be. This Court should not get into the position of having to make credibility judgments every time there is conflicting testimony. This case is really very simple: this Court initially found that there was a legitimate constitutional issue raised regarding a claimed deprivation of due process and ordered a hearing to be conducted; the hearing was held; Judge Pickett made findings of fact and conclusions of law recommending relief be granted; the findings of fact are

supported by the record and the conclusions of law are not erroneous. Therefore, they should be accepted.

We must take the record as we find it. Accordingly, we cannot add facts, assume facts, disregard facts, or accord certain facts greater or lesser significance. That is simply not our function. There is no question that the abundance of material presented with this case makes our task extremely difficult. That is why the trial judge is accorded the deference to make findings of fact. All that we should do is determine whether they are supported by the record. That is all. I have read every page of the writ hearing and although I may not have made the same findings of fact or conclusions of law as Judge Pickett, I do find that they are supported by the record. Consequently, unless we are willing to overrule all of the cases to the contrary or conjure up a way to deceptively distinguish them we actually have no choice but to accept the findings and conclusions that have support in the record.

Judge Campbell, in his dissenting opinion, also takes issue with the specific ground upon which relief is granted and claims that it is actually newly discovered evidence "wrap[ped] ... in the more attractive cloak of due process ..." Dissenting Opinion, slip op. p. 898. To continue the metaphor: whether the issue is clothed or wrapped in due process is irrelevant. I agree that this Court should not be the repository of every complaint that can be made relative to a claim of newly discovered evidence. But, in the context of this case, when fundamental liberties have been deprived then the newly discovered evidence is the equivalent of a due process violation. And, Judge Campbell's conclusion implicitly concedes that a due process right was implicated. He dismisses it on the basis that he would not have made the same findings as Judge Pickett. As I stated previously, I might not have either,

but that is not the issue. Judge Pickett's findings are supported by the record. Thus, they should be accepted.

The majority opinion recognizes this. That is why I have joined the opinion.

MILLER, J., joins.

McCORMICK, Presiding Judge, dissenting.

I join Judge Campbell's Dissenting Opinion and reiterate that even if every finding by the habeas court is taken as true, there is no legal precedent upon which the majority can grant the relief it does. The records before this Court of applicant's two trials and two habeas hearings totally belie the habeas court's findings of fact. The only "blind focus" which has occurred in the history of this cause comes today with an opinion that so manipulates the law and the facts as to do irreparable harm to the future of Article 11.07, V.A.C.C.P.

I write merely to point out a few of the many glaring factual errors made in the majority opinion. Although the findings of the habeas court, if taken as factual, may raise the specter that another or others may have been involved with applicant in the commission of this murder, there is absolutely no evidence which remotely tends to exculpate applicant or to show that he is not guilty.

In finding that applicant is entitled to habeas corpus relief in this case, the majority has relied extensively upon the habeas court's findings of fact. The habeas judge[1] has concluded, and the majority agrees, that the State has violated applicant's due process rights because "the investigative procedure was so impermissibly suggestive that false testimony was created." Although neither the habeas court nor the majority has cited relevant authority, both rest their conclusions on "the facts underpinning" the habeas court's conclusions. Significant findings by the habeas court, however, either are not supported by the record, are clearly erroneous, or are the result of testimony taken out of context. Almost all findings by the habeas court judge that are utilized by the majority are inaccurate in some form.

The majority begins its recitation of the facts relating to the investigation of the murder by stating that Texas Ranger Wesley Styles was called in to head the investigation and that he immediately arrested applicant. This is not supported by the record and is the first of many absolutely distorted and biased reporting of the record. The District Attorney of Montgomery County, James Keeshan, called Styles to aid in the prosecution after the Conroe Police Department had already developed evidence relating to the murder. Among the facts known to the Conroe Police and Styles before the arrest of applicant were: Cheryl Fergeson was a member of a girl's volleyball team that had come to Conroe High School at around nine o'clock on Saturday morning, August 23, 1980, to participate in a tour-

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[1]Neither of the trial court judges that sat during applicant's trials participated in the hering which resulted in the findings of fact upon which the majority rests its decision. A reading of *all* the records of applicant's trials and hearings demonstrates the total failure of the habeas judge to review these records.

nament. For some reason or another, Cheryl had left the gym area where the other girls had begun to warm up for their matches. When Cheryl did not return the other girls began to search the school grounds.

Written, sworn statements were taken from applicant and three other Conroe High School janitors (Sam Martinez, Gary Acreman and Henry Peace) before applicant's arrest and before Styles's involvement. These initial statements are all consistent regarding the following: On Saturday morning, August 23, 1980, four janitors along with applicant, their supervisor, were preparing the school for various activities. Applicant had directed the janitors to set up chairs in the school cafeteria. The janitors finished their jobs. While looking for applicant to see if anything else needed to be done, they saw a girl go into the restroom. After the girl entered the restroom, applicant arrived with toilet paper. One of the janitors told applicant that a girl was in the restroom. Applicant told the janitors to go across the street to the vocational building. The janitors did so and waited there for applicant to come open the doors. Applicant, however, never came over to the building. About forty-five minutes later, applicant called across the street to one of the janitors to come and get the keys to the doors. The janitors completed their tasks in the building and were told by applicant to go home. Peace remained to help applicant lock the cafeteria doors. While doing so, applicant and Peace ran into the volleyball players looking for Cheryl. Applicant decided to look for the girl. He and Peace found the door to the auditorium to be unlocked; they checked inside. Applicant told Peace to look in the balcony behind the stage area "because some of the kids would get behind the boards and hide." (Applicant's Statement.) Peace discovered Cheryl's body behind a sheet of plywood.

The murder occurred on August 23, 1980. The District Attorney's Office, requested Styles's assistance in the investigation on August 28, 1980, and Styles began work on the case the next day. When Styles arrested applicant he was armed with information by the Conroe Police Department along with an arrest warrant supported by the following affidavit:

> Affiant, an officer with the Conroe Police Department (CPD) investigated the above offense along with other CPD officers. The victim, a 16 year old white female was found naked and strangled in a loft area above the auditorium stage in the main building at the Conroe High School. She had been missing for about two hours when her body was found. The victim had been at the school for a short time to attend a volleyball tournament being held in a gym near the main building. CPD officers found her clothing two days later in a plastic bag identical to those used by school personnel. Affiant and other CPD officers interviewed and took statements from tournament participants and from all custodians on duty on the morning of August 23, 1980 when the crime occurred. Based on the location of the body, the disposal of the clothing and the fact that auditorium and other doors in the main building were normally locked on Saturday (as this was), it appeared that the offense was probably committed by an employee of the school.
>
> Affiant has probable cause to believe and does believe that the offense was committed by Clarence Brandley, a black male, for the following reasons:

1. Brandley was arrested by CPD officers for committing an attempted rape and abduction on 3/7/79 according to CPD offense reports.

2. Said Brandley is presently on felony probation for possession of a prohibited weapon.

3. Said Brandley, according to four other custodians, was the only school employee in or around the main building who had keys to the auditorium, storerooms and other doors in the building at the time of the offense.

4. According to the other custodians, Brandley's whereabouts are unaccounted for during a 45-minute period at about the same time as that of the victim's disappearance.

5. A pubic hair found on the victim's body has been determined by the Department of Public Safety Lab in Austin, Texas, to be that of a black male, and appears identical to pubic hairs removed from said Brandley's person.

6. Said Brandley is the only custodian or employee who was on duty at the location who is a black male.

7. A Houston Police Department Polygraph Supervisor advised Captain Monty Koerner that said Brandley had failed a polygraph test administered to him on August 25, 1980, in connection with the offense.

The majority's statement that Styles arrested applicant with the "preconceived, premature notion that applicant had committed the murder," ignores that Styles had the written statements of essential witnesses before him and arrested applicant under judicial authority. Any implication made by the majority that Styles investigated the murder offense without resort to relevant information in an effort to convict applicant is not supported by the record and should be rejected.

The majority opinion also attempts to discredit the walk-through that Styles conducted with three of the janitors. The majority writes that the walk-through "generated" stories. The majority therefore holds that because one of the janitors, John Sessums, is now implicating Gary Acreman nine years after the murder, this leads to the conclusion that the walk-through "created false testimony."

The majority is wrong. First, as Judge Campbell points out in his dissent, John Sessums did not testify at applicant's trial.[2] It is, therefore, impossible that anything he now asserts as being true created false testimony on his part at trial. It is outstanding that the

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[2]Sessums's testimony at the first of applicant's two trials and at the first writ hearing was consistent to that of his initial statements to police. Keeshan testified at the second writ hearing, however, that he did not use Sessums as a witness at the second trial because at applicant's first trial (which resulted in a mistrial when the jurors were unable to agree on punishment) Sessums became "confused" on cross-examination and would "testify in every direction." Apparently defense counsel concurred in the District Attorney's assessment of Sessums as a witness. The trial record makes it abundantly clear that Sessums was presented to defense counsel to call on applicant's behalf but that applicant declined to do so. It is ironic that the majority now accepts Sessums's second writ testimony as credible but turns its back on all former testimony.

majority is willing to place faith in Sessums's writ hearing testimony when, *even before the walk-through,* Sessums gave the following sworn statement to police:

> I came to the school about 8:00 A.M., I rode to work with Gary in his Datsun Pickup, orange and white color. We park in front of the vocational building. We walked over to the main building, the doors were all locked and we waited for Clarence. We waited about 10 or 15 minutes. Sammie came up after we got there and was also waiting. Clarence came down the sidewalk and opened the door. There was another subject Eckie a short stockey guy, he also came up about the time as we did. All five (5) of us then went to the cafeteria and Clarence showed us where to set up the tables and chairs. It took about a hour and a half to set up the chairs. When we finished we walked out in the hall to the front of the building. We waited 10 or 15 minutes. There were a couple of people standing in the hall around the end where the gym is. When Clarence came up a girl was coming up behind. We kidded him about watching out, there is a pretty girl coming up behind him. She had blond shoulder length hair, about 5' tall, she had blue jeans and a pullover sweater on. Clarence told us what we had to do and where to go. The four (4) of us then went to the annex to set up chairs. Clarence said he had something to so and stayed behind. We set at the annex about five (5) minutes, then Eckie went back and got the key from Clarence. When he got back we set up the tables and chairs. We finished if and it was around 10:30 or 11:00 A.M. Clarence came

over and told us it looked good and we could go home. That is when Gary and I left, I do not know when Clarence and the other two left."

[Sic throughout.]

Nowhere, in this statement does Sessums say that he heard a girl scream "no" and "don't"; nowhere in the statement is there any indication that another person other than the janitors may be involved; and nowhere in the statement is there any indication that Acreman is involved, yet these events, if true, would be highly significant. Regardless of how the walk-through was conducted, it would be impossible for it to have generated such blatant inconsistencies.

Moreover, the majority fails to consider that none of the other janitors who gave written statements to the police prior to Styles's involvement implicated Acreman, yet if Sessums's story were true, the events that he now says happened would have taken place when all janitors -- including applicant who did not participate in the walk-through -- were together. It is surprising that the majority has failed in its rendition of the facts to include applicant's testimony, but applicant, accompanied by his lawyer, testified during the grand jury proceedings as follows:

"Q. Why were you going to put [toilet paper] into the boy's restroom, had you already checked the other one?

"A. No. I -- there was a lady had already went up there -- she took the paper up there. She came back and I was on my way back.... That's when I met all of them. They were standing....

[Questions and Responses regarding the girl who took toilet paper into the restroom]

"Q. How did you come to talk to her?

"A. She was standing in the hallway when I asked the coach about [the toilet paper] and I asked her would she run up and check that one and then I left and went back up and this is when Ackerman, Sam, Henry Peace and John was all standing. I told them, "let's go across the street" and I sent them over across the street and I said I'll be right over."

When asked if he had seen any other person in the main building around the cafeteria, applicant responded that he saw a young man and lady. Applicant also testified that he saw no other black males in the building that day, no school personnel and no other custodian. Asked if he had seen anyone else, applicant testified, "Nobody else." Thus, *even applicant* did not implicate Acreman or anyone else in either his affidavit to police or in his testimony before the grand jury. Moreover, and what the majority has conveniently ignored, applicant, himself, exculpates the other janitors at the school on the day of the murder. The following colloquy occurred during the grand jury testimony:

"Q. You don't believe any of the other custodians did it?

"A. Not after the experience I've had with them. They don't seem to be the type of person that would do it.

"Q. Would they have had the opportunity to do something like that?

"A. No.

"Q. You didn't know of an opportunity that they would have had to do it?

"A. No, sir."

In addition to his grand jury testimony, applicant executed an affidavit on August 23, 1980, concerning the events that occurred on the day of the murder. The events as outlined by applicant fail to support even remotely Sessums's account of the events.[3]

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[3]Applicant's sworn statement to police is as follows:

> Beverly Dupre brought me to work a 7:40 A.M., Ackerman, Sam, John and Henry Peace were already at the school when I arrived. I opened the doors and let them into the cafeteria, and then I showed them what I wanted them to do. I then went into the gym to unlock the doors and take out the trash, then I left the alan wrench with the coach in charge of volleyball team so she could lock doors. Then I went to the Shamrock Station and bought me some cigarettes. Then I came back to the girls gym and asked the coach if the bathrooms have paper and then I left and went back to the front of the building. I sat down and waited for the guys to finish cleaning the cafeteria. When they finished with the cafeteria, I sent all of them to the vocational building across the street to set up 85 chairs for Monday and I went to put toilet paper in the restrooms. Then I went across the street and the guys finished putting up the chairs. I then told John, Ackerman, and Sam that they could go home

(Footnote continued on next page)

Therefore, if we accept the majority's conclusions that the walk-through generated false testimony we must also accept that the other janitors, *including applicant,* gave false statements in their initial reports to the police and that applicant lied in the grand jury proceedings. It is far more likely that the passing of nine years is responsible for changes in Sessums's account of the incidents at the school, not the investigative procedures utilized by Styles. Indeed, Sessums testified at a prior writ hearing on August 18, 1986. At that time the only significant change in his account of the events was that he saw Acreman talk to a girl as she entered the restroom. None of the events that he now claims to have happened are included in

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(Footnote continued from previous page)

> and Henry and I went back to the main building to lock up cafeteria. We heard some girls calling for someone and they told us that one of the girls was missing and they were looking for her. I told Henry that we needed to check all doors and make sure they were locked. Henry and I started checking the doors and it was then we discovered that the auditorium door was open. We went inside the auditorium and started looking around. Then we discovered that the back door of the auditorium was open. We went on to the stage and cut the lights on so we could see. I then told Henry to look up around the stage because sometimes the kids would hide in there. Henry and I were looking up on the balcony behind the stage because the kids sometimes get behind the boards and hide. Then Henry moved this sheet of plywood and called me and I went over there and saw the girl lying there. I then checked her pulse and found no pulse. I then went and got one of the Police Officers and showed him where the body was.

his testimony at this hearing.[4] Again, the majority errs in accepting the habeas court's findings of fact, such findings regarding John Sessums are clearly erroneous and should be rejected.

The majority also claims that Acreman may have given false testimony due to the walk-through. The majority is willing to place its faith in a video taped interview of Acreman that was admitted into evidence at the writ hearing. In the taped interview, Acreman implicates another person, James Dexter Robinson, as an assailant. The majority opinion, however, fails to relate how that interview occurred, to wit: Richard Reyna, a private investigator for applicant, testified that before he began his interview he told Acreman that there "was a new eye-witness account that was putting him ... and James Robinson on the landing with the girl and that there had been trouble." Further, Reyna told Acreman: "You don't need to take the rap for anyone .... I fed him this ... I said the girl was being grabbed and she was yelling for help .... Then I told him that James Robinson had run upstairs from the water fountain. I said we know that."

At the writ hearing, Acreman recants what he told Reyna on the video tape and testifies that he was

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[4]A video taped interview of John Sessums by applicant's attorney was admitted into evidence at the writ hearing. In it Sessums appears to be intoxicated and must be coached into describing events and persons. For example, before Sessums is able to identify Robinson he must be shown a photograph. Even after being shown a photograph, Sessums is unable to name Robinson and must refer to him as the man with no teeth.

One of applicant's own witnesses testified at the writ hearing that Sessums is an alcoholic.

"scared into telling what was said."[5] Also at the writ hearing, the habeas court judge entered a finding that "[b]ased upon Gary Acreman's answers to questions and his countenance during the many hours that he was on the witness stand, this court finds that his testimony at the evidentiary hearing was incredible, untruthful and generally not worthy of belief."[6] When the majority relies upon the video taped interview of Acreman to suggest that false testimony was elicited at applicant's trial, the majority relies upon unsubstantiated hearsay by a man called unworthy of belief by the habeas court judge and whose out-of-court statements are contrary to applicant's grand jury testimony. That is, asked if he had seen anyone else at the school on the day of the murder, applicant testified, "Nobody else." This is significant since Acreman places Robinson with the girl at the top of the stairs leading into the bathroom. It is unrefuted that this is at a time when applicant and the four other janitors are together. Again, if the Court accepts the habeas court's findings this means that applicant perjured himself in the grand jury proceedings. The more appropriate response

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[5]When Reyna was asked about his investigative techniques in securing Acreman's and Sessums's stories, he related, "My tactics were not any different than tactics applied by your officer of any other police agency. They are the same." Thus, the majority would have this Court find that when a Texas Ranger conducts an investigation that utilizes certain techniques it produces false testimony, when, however, applicant's investigator utilizes the same techniques it produces reliable information.

[6]This one finding by the habeas court is not clearly erroneous. Three witnesses who testified on behalf of applicant at the writ hearing, stated that Acreman had told them that he knew who had committed the murder. Each witness, however, testified that they did not believe Acreman when he told them this. One of these witnesses testified that Acreman was a "nut, a kook," and appeared to be drunk when he said this. Another described Acreman as "always acting big."

to the habeas court's findings concerning Acreman's out-of-court statements would be to reject them. They are clearly erroneous.

The habeas court finds and the majority blindly accepts that another janitor, Sam Martinez, had changed his rendition of the facts due to the walk-through. Again the majority ignores the record. Martinez gave the following statement to police prior to the walk-through:

> Went to work around 7:35 A.M. in cafeteria to put table and chairs in cafeteria. Finished in cafeteria sometime between hour of 9:00 A.M. and 9:30 A.M., not sure when. Next went to look for Clarence, found him coming up stairs with two rolls of paper. Then saw blonde-headed girl go to the girl's restroom. She had on blue jeans, medium hair. Next we asked Clarence what to do, he told us to go across the street to the Vocational Building. We did, and then we waited about 30 minutes before he came out of the main building and called to the short man to come to get the key to the building. Then we set up chairs there, we finished this, then he came and told us that we were finished, which was about 11:00 A.M. or little after.

Admittedly, Martinez's second statement, made after the walk-through is more thorough and includes a time reference that is not in the first statement but, as Judge Campbell has indicated, there are no significant discrepancies between the two statements. Moreover, the majority fails to understand that those facts that have been added are easily verifiable. That is, additional facts are added to Martinez's second statement,

but these facts for the most part relate to where Martinez was during the time that the event occurred. For example, in the first statement, Martinez relates that, "Next went to look for Clarence, found him coming up stairs with two rolls of paper." In the second statement, this becomes:

> Then Gary, John, and I came out of the cafeteria through the same door as we had entered, and walked on down the hallway of the Auditorium area to wait for Clarence to give us our next assignment. We waited in the hall just a short way from the stairs that lead up to the choir room. There were two restrooms at the top of the stairs.... Clarence came up the stairs from the gym and was carrying toilet tissue. He started on up the stairs toward the restroom....

Comparing the two statements it is obvious that the only significant difference between the two is that in the second various locations are added. These locations are easily verified by looking at the map of the school contained in the statement of facts from the trial. For the most part, this is true with the additional facts that have been added to the second statement.[7] The majority's reliance upon the habeas court's findings regarding Martinez's statements is wrong as these findings are, again, clearly erroneous.

The majority next attacks the testimony of Henry Martin Peace. Peace testified for the State at

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[7]Judge Campbell has included in his opinion the first and second statements taken from Martinez, Sessums and Acreman. As is the case in Martinez's second statement, both Sessums's and Acreman's second statements merely include various locales that are easily verifiable.

both of applicant's trials. Peace's testimony implicated applicant because Peace consistently stated that applicant told him to check the loft area in the auditorium on three occasions during the search for Cheryl Fergeson. Ms. Fergeson's body was eventually discovered by Peace in the loft area. The majority implies that Peace's story was a result of Ranger Styles's coercion of Peace. Again the majority has placed its reliance upon the habeas courts' findings and again the majority's reliance is misplaced.

In recounting the evidence that Styles had forced Peace against a wall, choked him with the chain around his neck and threatened to blow his brains out, the majority ignores the fact that Styles had focused on Peace as a suspect and was not attempting to influence Peace's testimony regarding *applicant's* activities on the day of the murder. Peace's testimony bears this out:

> "Q. [by Judge Pickett] Are you under any kind of fear from anyone or intimidation?
>
> "A. Well, the only person I'm not too sure about is Wesley Styles because he did come out to my house which I'm going to have to testify under oath, he did come out to my house, roughing up or standard police procedure, but he did get me by the shirt. I don't know whether you call it shoving me, pushing me or however. But he did put me up against the wall and took everything out of my pocket. He kept telling me I killed the girl."

The record, however, is devoid of *any* attempt by applicant to link the mistreatment of Peace to any fabrication of Peace's testimony regarding applicant. The majority seems to infer that applicant has standing to complain about Peace's potential due process violation and thereby bootstrap himself into the same position as Peace. The majority does not cite one case supporting this proposition nor do they show in any manner whatsoever that Styles treatment of Peace influenced his trial testimony one way or the other.

In addition, the majority attaches significance to Peace's treatment by the District Attorney's office when Peace complained of Styles's activities. Peace testified that members of the District Attorney's office told him he was "hallucinating" the incident regarding Styles. The majority again fails to link the treatment of Peace to any falsified or tainted evidence that affected applicant in any manner whatsoever. Applicant's implied argument would have this Court accord applicant standing to benefit from the alleged wrongdoing that Peace suffered and the majority opinion gives tacit approval to this new found judicial concept of standing by inference when discussing Peace's assertion that he would have preferred one of his relatives read his statement back to him. Peace was not able to read without assistance. Peace testified:

> "Q. [By counsel for applicant] Did the police take a statement from you shortly after the murder?
>
> "A. Yes, sir, they did.
>
> "Q. And did they write up that statement?

"A. They wrote something on a piece of paper you have. I have no idea what it was.

"Q. Did you request any aid in the reading of the statement?

"A. Yes, sir. I asked for my sister or brother-in-law to be able to be there so he could read it to me. He said it wasn't necessary.

"Q. Would you have trusted your sister or brother-in-law to read it correctly to you?

"A. Yes, sir.

"Q. What were you told by the police when you requested your sister or brother-in-law to read the statement to you?

"A. Well, they just told me it wasn't necessary.

"Q. Did you believe that you would be able to leave if you didn't sign the statement?

"A. Well, they told me I would have to sign it before I could leave.

"Q. And did you try to place a call to any either your sister or brother-in-law?

"A. I wanted to but they told me I had to stay there until they got through

with the statement.

"Q. *Now, Mr. Peace, did you meet with a Texas Ranger by the name of Wesley Styles?"*

The majority's argument seems to follow along the lines that since Peace was not granted his request for reading assistance that his statement was false. Yet note the last line of emphasis in the replicated testimony. Applicant's counsel never asks if the statement was inaccurate. Applicant's counsel hops to a new topic and never broaches the consequences of Peace's denial to pick the reader of choice for his statement. Why? Because the record is abundantly clear that when it comes to the events at the school on the day of the murder, Peace's testimony has not changed significantly as it relates to applicant's involvement. Even applicant's investigator, Richard Reyna who testified at the writ hearing, indicated that Peace has remained unwaivering in his account of the events at the school on the day of the murder. Peace testified to the following at the second trial:

"Q. [questions by Morris, counsel for applicant] Now, how many statements did you give in this case, Mr. Peace?

"A. I've only given one.

"Q. You've only given one statement. And when was that statement?

"A. That was on Saturday that girl got killed.

"Q. On the 23rd day of August?

"A. Yes, sir.

"Q. And I know that you can't read or write, can you?

"A. No, sir. I can't.

"Q. Did somebody make this statement up and read it to you?

"A. I went to the police station with a police officer. He sat there and wrote it up on a piece of paper and then he read it back to me, and then he went and had it typed up and they they read it back to me again. And I initialed it."

Thereafter, Peace's testimony is consistent with his statement to authorities.

Further, the majority misstates the record when they write that Peace was not allowed to leave the police station until he signed a written statement. Peace stated that he wanted to place a call to relatives but the police officers told him he had to stay until they got through with the statement. This is a far cry from the majority's attempt to color this testimony as representative of improper police activity. The majority's and the habeas court's incomplete reading of the records in this case leads them to a result not even remotely supported by the evidence. Applicant has failed to show the harm *he* suffered as a result of the interplay between the authorities and Peace and, indeed, applicant is incapable of showing such harm since Peace has adhered to his trial testimony regarding the events at the school.

Last, the majority points out that Peace was told that the "nigger was elected" [referring to applicant as suspect] as perpetrator of the crime because of his size and apparent strength. Aside from the odious nature of the racial epithet the majority has failed to show why applicant would not be elected as the prime suspect in this crime. Negroid pubic hairs were found in the vaginal area of the victim and applicant was the only Black at the school on the day of the murder. Further, applicant was the only janitor whose time was unaccounted for during the critical period after the victim disappeared. The victim was seen near applicant soon before her death. The strangulation marks around the victim's throat were consistent with having been made by applicant's belt. Applicant was the only one of the janitors with keys to the auditorium and in his statement to police he indicated that he was aware of the loft area. The majority, however, reasons that the presence of a racial slur in and of itself can exonerate applicant. There is no legal support for the majority's proposition that the utterance of a racial epithet applied to a suspect constitutes grounds for a due process violation when the facts clearly point to that person as being the culprit.

The majority finds another due process violation because authorities failed to follow leads that may have been inconsistent with applicant's guilt. Again the majority can cite no relevant authority but has determined that the facts developed at the writ hearing support this conclusion. Again the majority errs in following the habeas court's findings.

The majority writes that Texas Ranger Styles maintained a blind focus that applicant had committed the murder and points out that a Caucasian pubic hair

was found near the victim's vagina.[8] The majority, taking Styles's testimony out of context from the writ hearing, quotes him as saying, "Let's say I didn't do it and it wasn't done and why it wasn't done, I don't know," as being responsive to the question of why hair from the other janitors were not compared with the Caucasian pubic hair. The majority ignores that Styles at the writ hearing testified that, "I assure you, during my investigation, if it had been anyone connected with Clarence Lee Brandley or other than him, he would have been charged with it, sir." Styles further testified that the janitors alibied each other; this is supported by the testimony given by the janitors at trial and by applicant himself, who in his grand jury testimony, indicated that the other janitors would not have had the opportunity to have committed the murders. Upon cross-examination, applicant's attorney asked Styles:

> "[I]f you look back on it now twenty-twenty vision and it's not fair to you, I don't suppose, to point out things that have come up since you concluded your investigation, but if you look back, don't you think it would have been the prudent thing to do at least take samples of the other janitors' pubic hairs . . .?"

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[8]This is not altogether correct. The testimony at trial by expert witnesses was that the Caucasian hairs found near the victim's vaginal area were "possible" pubic hairs, and, unlike the Negroid hairs, these Caucasian hairs had not been forcibly removed.

Further, the majority conveniently ignores that authorities had taken pubic hair samples from Peace to compare with the hair found on the victim. The majority also conveniently ignores that at trial applicant's self-chosen expert testified that the Caucasian hair found on the victim did not compare favorably to those of Peace.

Styles answered, "[I]f you say it's a good idea. I'm going to agree with you." Applicant's attorney, then responded, "No, I want you to say it." Styles response was "Let's say I didn't do it and it wasn't done and why it wasn't done, I don't know." When the majority repeats this answer in the opinion, it ignores first, the answer is taken out of context and is only indicative of what Styles would do nine years after the initial investigation when one of the janitors has altered his story of events and second, it ignores testimony by Styles that he did not investigate the other janitors because they were able to alibi each other. Certainly, that others were not investigated because they indicated that they had been in each other's company during the murder was a reasonable action on the investigator's part. The alternative would be that all the janitors, including applicant, were covering up for the killer or killers, as such, Styles properly centered his investigation upon applicant, the only person whose presence was unaccounted for during the time that the girl would have been killed.

Moreover, the majority asserts that the State should have investigated the other janitors because the blood on the victim's blouse was type A and it could not have come from the victim because she had not been cut in the upper areas of her body. This is wrong. At trial, Pat Lux, the chemist who conducted the examination of the items sent to her by the Conroe Police Department, testified that she did not examine the blood on the blouse. The following colloquy took place:

> "Q. So you made no effort at all to determine from testing that blood stain what type [of] blood that might have been . . .?"

"A. Okay. I couldn't have gotten an enzyme from that stain. That stain was too weak. . . .

"Q. But you could have determined whether it might have been A or B or O type blood, possibly, right?

"A. Yes, sir.

* * * *

"Q. [Y]ou attempt to determine things that might be important as evidence in a court of law, don't you?

"A. Yes, sir. But these items were all packaged together in one package, the blood stains from the socks and from the panties. It's hard to say if that blood stain came from these socks that were packaged in there . . . ."

In short, the blood on the blouse could have come from the other bloody items found in the plastic bag. Indeed, all physical evidence was turned over to an expert chosen by applicant to conduct his own analysis, and even applicant's expert failed to examine the blood spot. What the majority fails to relate in its facts, moreover, is that the blood on the blouse was examined during the trial. Moreover, it is significant that the majority opinion fails to include in its rendition of the facts that Peace's blood *was* taken and inspected for comparison. That blood from the other janitors (who along with applicant in his grand jury testimony, had alibied each other during the critical time) was not taken for examination was again a reasonable action on

the part of investigators. There is absolutely no due process requirement that investigators exclude beyond any reasonable doubt other possible suspects. Here the other suspects were eliminated by the State because they were in each other's company--nothing more is required on the State's part to conform to due process requirements.

The majority also faults the State for its failure to maintain vaginal swabs for further analysis. It should be emphasized that there is absolutely no showing that the swabs were discarded in bad faith by state agents; no such finding was made during the writ hearing and no such finding is even remotely supported by the record. Moreover, the record clearly indicates that at the time that the swabs were analyzed, state agents followed routine procedure in maintenance and examination of the swabs. Dr. Joseph Jachimczyck, the Harris County Medical Examiner, testified at applicant's second trial as follows:

> "Q. And in the case of a murder, or homicide, committed in the course of rape or attempted rape, what is the normal procedure for handling vaginal smears, swabs, washings, stains, that sort of things?
>
> "A. Well, we obtain the specimen and I turn them over to my chemist-toxcologist and I request the particular examinations that I want performed, and then he performs them for me and reports his results to me. Once we've completed our examination, we've either consumed the specimen, depending on the particular determination or we

discard it after we've gotten the information that we needed.

"Q. Now in the case of a requested autopsy from another county, do you normally just permform the autopsy, and then turn over to some officer or authority from that other county, those vaginal swabs, washings, etc.?

"A. No, the usual procedure is I handle it like I do anyone of my own cases, except if specifically requested by another agency. Then I will provide them with whatever samples they would like to have. If for example, they want a sample of blood, I'll give them a sample of blood. If they want to have their own independent smears, I'll make those available. I'll give them a set of smears, but we do our own in our lab. We don't send them off anywhere.

"Q. Well, do people pick up those samples frequently and send them off to another lab, such as the Department of Public Safety lab?

"A. No, sir. Not at all frequently. No.

"Q. But do they do sometimes?

"A. Yes, on occasion it is done.

"Q. Now, are those vaginal swabs, washings, etc.--do they have any purpose or use in identifying an

attacker?--helping to identify the attacker?

"A. They may. There's a limited use for them. Not so much identifying the attacker, but rather excluding a suspect.

"Q. Because--isn't it a fact that the running of those liquids--or the examination of those liquids could never in any case than you can imagine identify any one single person as the person that did it?

"A. Not to my knowledge.

"Q. But it can identify a segment of the population that could have done it and exclude another segment of the population, that could not have done it.

"A. That is correct.

"Q. For instance, I believe you determined in your testing that Cheryl Fergeson had A-type blood?

"A. Yes, sir.

"Q. And you didn't do any further testing to try to determine the blood type of the donor of any of the liquids or semen that you found in the area of the little girl's body?

"A. No, sir.

"Q. And is it my understanding that you keep some of these for up to thirty days and then throw them out, because you don't have room to store those things for more than thirty days?

"A. Yes, sir.

"Q. And in this case you made no--you didn't try the blood type of those semen samples that you found?

"A. No, sir.

"Q. Would that have been possibly useful in excluding certain individuals?

"A. If they were secretors, probably yes. If they are not secretors, probably no.

* * * *

"Q. But is it your testimony that none of those tests were run with regard to the vaginal swabs or stain washings or vaginal washings in this case?

"A. I did not do that. That is correct.

"Q. Doctor, did you store any of those solutions, containing semen for any period of time, to your knowledge?

"A. No, sir. I have been informed by my staff that a request was made sometime during the middle or later part

of the week of the autopsy, the autopsy being Sunday, and at that time, there were no swabs available. There was blood available, which was turned over to the Department of Public Safety lab.

"Q. Doctor, you'll probably recall a conversation with me, when I called with regard to the possibility that you might have such samples available. Do you remember that?

"A. I remember that, now that you remind me. We did not have it at that time.

"Q. Right. That was sometime up in the first or second week of October after we got your autopsy report.

"A. Yes, sir.

"Q. I believe you stated that you wouldn't have them in any event, because it had been longer than thirty days?

"A. That's right. Thirty days is generally a maximum that we would have normally kept them.

"Q. Well, Doctor, did you have enough from the washings of stain in the groin area, and any washings or swabs from the vaginal area to have gone further and tried to blood type

those liquids and run ABO or PGM, esterase, or any of those other tests?

"A. We did not. No, sir.

"Q. You didn't have enough?

"A. No.

"Q. So, you didn't even have enough to blood type it?

"A. That's right.

"Q. What did you use the samples that you had for? What did you do with them?

"A. Ran the acid phosphatase reaction.

"Q. Was that --

"A. And then they were discarded.

"Q. Well, you mean the samples were discarded, but did you have enough to proceed further and attempt to blood type the semen?

"A. No, not at the time we had the smears. These were only smears. They were not actually liquid. They were just a smear. The smears and the swabs. The wet swabs and the washings that we had we utilized that. That was consumed during the process of checking for the acid phosphatase.

"Q. Do you use a saline solution to wash the stain?

"A. Right.

"Q. And there was no way that you could have gone any further and run any tests?

"A. Of, if we were set up to do it, we could have, but we didn't feel the need for it at the time.

"Q. Well, if you were set up--I'm sorry, I don't believe I understand.

"A. If we were set up for it, I've since learned that the Department of Public Safety is set up to do this kind of sub-testing that you're describing.

"Q. You're not set up in your lab that you can run those particular tests?

"A. No, sir.

"Q. Well, so would it be correct to say you might have had enough, but you're just not set up to run all them?

"A. Both are correct. I did not have enough fluid, and I was not set up to run them either.

"Q. Well, were--

"A. --But even if I had the specimens, we couldn't run them. There wasn't enough fluid there.

"Q. Were any requests made for those fluids from the lab--

"A. As I say--

"Q. --at the time of the autopsy?

"A. --No, not at the time of the autopsy. I turned over whatever was requested at the time of the autopsy, and I've indicated here what those items were.

"Q. Was Captain Monty Koerner present during the autopsy?

"A. Yes, sir.

"Q. Is he chief of detectives for the Conroe Police Department?

"A. I don't know his specific title, but he is with the Conroe Police Department.

"Q. Did he request those items from you that you gave him?

"A. Yes, sir.

"Q. He requested the items that you gave him, such as the particles of dirt and hair and those other things?

"A. Yes, sir.

"Q. Did you have any conversation with him with regard to whether or not you were going to try to blood type the semen samples or run those sub-group tests?

"A. I don't recall, but I told him we were gong to do our usual procedure, namely the acid phosphatase and the microscopic slide preparations.

"Q. Well, quantitatively, how much of the seminal solution do you need in order to run the acid phosphatase test?

"A. About a CC.

"Q. Okay. About a CC, but that is a very dilute solution, isn't it?

"A. Right.

"Q. And in making washings on the groin area, how much liquid or solution did you end up with following the washing?

"A. I don't remember exactly how much, but not too much, because we didn't want to dilute that stain any further than what was necessary to do the test.

"Q. Now, I believe that you said that you took a swab from the vaginal area?

"A. Yes, sir.

"Q. Is that a wet cotton swab?

"A. Well, it was dry when we started, and it became moist, when we got the specimen.

"Q. Okay. And then you made a smear on a slide?

"A. We made two--two smears each from the mouth, vagina, and rectum on the microscopic slides and stained those to demonstrate the presence or absence of spermatozoa.

"Q. Okay. And upon taking vaginal swabs and making the microscopic slides, could you have taken the semen or fluid that was left in the cotton swab and made a solution of it and run some tests?

"A. I suppose that could have been done.

"Q. But that was not done in this case.

"A. No, sir.

"Q. Well, is it possible there would have been enough upon taking the swab and washing the swab out and making the solution that you could have blood typed it?

"A. It's always possible. It depends on the concentration of the fluid itself.

And it depends on the amount of enzymes and the heaviness of the smear, and the--whether the person is a secretor or not. There are a number of variables that--but, as far as is it possible, yes, I would say it would be possible.

"Q. So you don't know whether there was or there wasn't enough on the swab to run those blood tests?

"A. The swab looked awful dry to me. That's all I can say."

Dr. Jachimczyk's testimony on direct examination at the writ hearing is as follows:

"Q. All right. In the autopsy of Cheryl Fergeson, did you obtain what is commonly referred to as a cotton swab of the vagina area?

"A. Yes, sir.

"Q. And the purpose of that is what?

"A. Well, the purpose of obtaining the cotton swabs is to check for the presence or absence of any spermatozoa or if the presence or absence of any seminal fluid in the form of the enzyme, the acid phosphatase which was a component of seminal fluid.

"Q. In this particular case, where it was reported to you I suppose a suspicion of rape and murder, were you looking

for evidence of spermatozoa or semen?

"A. Well, in view of the injury that I saw on the body, of course, I was suspicious of rape being a component in this particular death; therefore, I did my customary examination.

"Q. And doctor, when you find spermatozoa or evidence of spermatoza or semen in the vagina, is it collected on a cotton swab?

"A. Yes, sir.

"Q. Did you do that in this case?

"A. Yes.

"Q. Did you collect spermatozoa and semen on the cotton swab?

"A. Well, actually I collected the--

"Q. Fluid?

"A. Not really. There wasn't any fluid as such. We just took a smear, literally, of those portions of the body, that is, the vagina, the rectum and the mouth and we also took a washing of a stain that was present in the left groin.

"Q. All right. Now, do you preserve or, take it back, do you know whether or

not you personally gave the cotton swabs to Detective Koerner?

"A. I don't remember precisely whether I did or I did not.

"Q. And is there any written memo, have you searched your file to see if there's any written memo or such that would say what actually happened to the cotton swabs?

"A. No, sir.

"Q. Now, about a week after Monty Koerner was in your office for the autopsy, were you contacted by a Mr. Wesley Styles?

"A. I don't remember that I was.

"Q. Do you have any present recollection of whether or not the cotton swabs were given to either Monty Koerner or Wesley Styles?

"A. I do not recall at this time, no, sir.

"Q. Do you have any recollection or written memorandum that would say that you destroyed the cotton swabs?

"A. No, sir.

"Q. Dr. Jachimczyck, is it possible in your understanding of the heart of forensic medicine, that you can determine the blood type of the donor

of spermatozoa or semen if that person is a secretor?

"A. If he is a secretor and if there's enough material there to examine, yes, that can be done.

"Q. Now, who calls the shots, Doctor? Do you decide what test you're going to run or does the police department or the agency that retains you decide what tests are going to be run on any evidence that you have?

"A. Well, in so far as cause and manner of death is concerned, it is my decision. I do any and all necessary tests to determine the exact cause and manner of death. In so far as any evidence, where it concerns additional police investigation, I do not call the shots.

"Q. That would be done then by, in this particular case, either Monty Koerner or the Conroe Police Department or Wesley Styles of the Texas Rangers?

"A. Well, I can't say for sure whether in this particular case, but in general, that's the way it's done.

"Q. Do you have now, Doctor, the cotton swabs?

"A. No, sir.

"Q. You have searched your file and are relatively certain that they do not exist, at least in your office?

"A. I'm positive they don't exist.

"* * *"

Cross-Examination by Mr. Speers:

"Q. Dr. Jachimczyck, does your office or at least let me ask you with reference to your procedures back in August of 1980 when this autopsy was performed, did your office perform as a routine course or for that matter at any time blood grouping analysis of seminal fluid?

"A. No, sir.

"Q. Normally, in that situation if you've been able to recover some by cotton swab or whatever method though would be submitted to the D.P.S. Laboratory or to someone like that by the agency that was investigating the case?

"A. Well, we were not involved in that at that time. We did do a blood group but on the blood, not on the swabs themselves."

We were not even attempting that, no.

"Q. The whole purpose of your either the taking the swabs and taking the

washings, all that was just to determine whether or not there was either spermatozoa that you could see under the microscope or if not, seminal fluid as revealed by the presence of acid phosphatase; is that correct?

"A. Yes, sir.

"Q. So whatever tests you did not perform in the first instance for the purpose of subsequent testing to come up with blood group of the donor, wouldn't it?

"A. That is correct, yes, sir.

"Q. As I understand it, just to make it clear, as to the swabs that were taken by you or under your direction at the time of autopsy, the bottom line is you don't have any idea what happened to those. Is that correct? Or do you have some idea what happened to them eventually?

"A. *The ones that we did our examination on were discarded.*

"Mr. DeGeurin: Your Honor, I'm going to have to object. First of all, make sure this is not from hearsay at this time, and ask that the answer be stricken until it's demonstrated it's not from hearsay.

"The Court: Rephrase your question, Mr. Speers.

"Q. (By Mr. Speers) Obviously you used-- As I understand, there were two things done, there was some swabs taken, also some smears taken on microscope slides; is that correct?

"A. The microscope slides were prepared from the same swabs.

"Q. Okay.

"A. And then first the slides were prepared, literally smeared on a slide and then the residue is treated with a chemical and tested for the presence or absence of acid phosphatase reaction.

"Q. And after you, the swabs were used to perform that test, the acid phosphatase tests, you shucked them in the trash when you completed that test; is that right?

"A. *Not immediately. We discard them-- Now we keep them six months, but at that time, we kept them on the average of a month or less.*

"Q. So in terms of would you have used up all the swabs that were taken performing the acid phosphatase test or other tests?

"A. Yes. Well, the swabs would still remain but the acid phosphatase would no longer be demonstrable because whatever was there will

have been in a sense consumed during the process of the testing, the chemical reaction, in other words.

"Q. I guess the bottom line question, I don't know what the answer to this is, but would the swabs that you took and at any point after you had performed the test, would they have been of any use to your knowledge to anybody in making further studies as to the blood group analysis of the donor of the sperm?

"A. No, sir. No, sir."

* * * *

Redirect Examination by Mr. DeGeurin:

"Q. Doctor, I understand that when you make a--you take the cotton swab and rub it across a piece of glass on a slide to make a smear and from that smear you determine, you treat it and determine if there's spermatozoa or sperm? Or semen?

"A. No. The slide has first got to be stained and whatever cells are on the slide take up this stain and then we can look for and do look for the presence or absence of stained spermatozoa.

"Q. But you actually see it through the microscope, correct and, identify it?

"A. Oh, yes. You can't see that with the naked eye, no, that's for sure.

"Q. Now with the cotton swab you had used to smear the stain, that cotton swab is kept now six months and back then for a period of time; is that correct?

"A. Yes, sir.

"Q. And it's on that cotton swab would be traces, would it not, of actual fluid of some sort donated by the person who raped Cheryl Fergeson? Isn't that correct?

"A. Run that by me again, sir. I didn't understand your question.

"Q. The cotton swab that comes from the cavity of Cheryl Fergeson, the person you did the autopsy on?

"A. Right, yes.

"Q. You take that cotton swab, you rub it across the piece of glass for the test you're performing to determine if there is spermatazoa or semen?

"A. Well, spermatozoa, you can't tell semen on that at that point, only if the sperm are there are not.

"Q. Then after you have done that, you still have the cotton swab, do you not?

"A. Right.

"Q. And on that cotton swab is fluid donated by the attacker?

"A. Right.

"Q. Now, in the present art, are you aware of that from those cotton swabs, even without refrigeration left in a file cabinet drawer, then years later, a DNA molecule can be obtained and can identify like a fingerprint the person who actually did the rape?

"A. Well, I'm not sure of the accuracy that you point out.

"Q. Have you heard about the process?

"A. Not until I got the Court order that you requested.

"Q. And you are aware, aren't you, Doctor, that from the fluid that is left or substance that is left on the cotton swab through washings or whatever is necessary, you can obtain something from which with the proper methods the blood type of the donor of that spermatozoa or semen, you can determine the blood type if that person was a secreter?

"A. Yes, sir, providing that it was not subjected to any other chemical reaction.

"Q. Now, the cotton swab, did you stick it in some kind of chemical reaction?

"A. Yes.

"Q. How many cotton swabs were there?

"A. I don't understand--how do they work? There is a color reaction.

"Q. How many were there?

"A. Of, there are two.

"Q. Did you personally throw them both away?

"A. Now, wait just a moment. No. No. From where now are you talking? We had one from the mouth, one from the vagina and one from the rectum, so we had three.

"Q. All right. And all three of those cotton swabs are missing?

"A. All three of those, yes, they're no longer available, that's true."

Thus, the swabs were discarded after the analysis was conducted upon them per the standards utilized at the lab at that time. The majority's reliance upon testimony indicating that the present procedure, utilized by investigating authorities, is to maintain the swabs, is misplaced. What the current procedure is today--in a world where technological advances in forensic science are commonplace--is immaterial. In addition, nowhere in the record is any bad faith imputed to Dr.

Jachimczyck as a result of the laboratory guidelines he followed at the time of the Fergeson autopsy. The majority is wrong when it judges the nine year old procedures under today's standards.

The most tenuous argument advanced by the majority is that regarding the State's failure to investigate a lead by Cheryl Bradford. Supposedly, Bradford saw two men rushing through the gym around the time of the murder. She told this to her coach who in turn told the Conroe Police Department.[9] The majority faults the State for its failure to investigate further. The majority errs considerably. The Conroe Police questioned every girl participating in the volleyball tournament along with the coaches and staff. No other person interviewed verified Bradford's statement. An officer with the Conroe Police Department, who had interviewed each of the girls at the school, testified at trial that at that time "the gym was quite full" and that in attendance were men as well as boys. Thus, the majority would have the police investigate an unsubstantiated statement made by only one of several people interviewed that she saw two men in an area where police had seen several men. Certainly, this is an unreasonable requirement on the majority's part.

The majority finds Bradford's statement to be significant because, according to the majority, Bradford suffered "chills" when she saw a televised picture of James Robinson. The majority is taking Bradford's statement out of context and the habeas court and the

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[9]There was no evidence introduced at the writ hearing that the police actually received this information and that it was relayed to those investigators concerned with applicant's case. The prosecutor testified at the writ hearing that he was unaware of Bradford's statements.

majority completely miss the mark on this point. Bradford, at the writ hearing, testified:

> "Q. [by Mr. Speers] Now, when you were watching *60 Minutes*, was there anything you saw on *60 Minutes* that caused you to make phone call to the authorities?
>
> "A. Well, I was sitting at home that afternoon, watching *60 Minutes* and I was probably grading papers or I don't know, doing something, and anyway, we really wasn't paying attention to it and they said Clarence Brandley and they said Conroe High School and so I Started watching it. And all of a sudden they showed--they showed a guy on the television with kind of dark hair. I don't know if it's, if I recognized the guy, which I doubt I did because like I never saw the guy way back then face on, but I don't know if it was me recognizing him or just the thought of everything again that made me--I just got chills all over. I couldn't sleep that night so the next day, I had called one of the other coaches I worked with. I had told her everything. So the next day I called Conroe. I told them, you know, that I had--I was there when it happened and just made me call them again.
>
> "Q. Then did you this statement to an investigator from the Attorneys General's Office?

"A. Yes.

* * * *

"Q. [By State's Attorney] Mrs. Bradford, just to make it clear, in fact, you can't tell us that the person that you saw or one of the people that you apparently saw inside the gymnasium was the person whose picture you saw on *60 Minutes*?

"A. No, I can't."

Absolutely no basis exists for the inference that Bradford got the "chills" because she recognized Robinson from the televised photograph. The majority's requirement that the police officers investigate Bradford's statement further is completely unreasonable--the lone statement is not only unsubstantiated by other witnesses at the scene, it is of little probative value in inculpating Robinson and is of no value in exculpating applicant. As Judge Campbell aptly concludes, that other persons may be implicated in the murder in no way disproves applicant's guilt.[10]

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[10]The majority fails to relate that, upon defense counsel's request, the Attorney General's Office conducted an independent investigation of the Brandley trial. Robert Bodish, an investigator for the A.G.'s office with fourteen years' experience, testified at the writ hearing that he investigated Bradford's statement. In so doing he concluded that where Bradford said that she had seen the men running through the gym, there is no access form the gym into the auditorium and that the two men would have been no where near where they would have had access to the auditorium. Thus the minute value that Bradford's statement may have in inculpating others is further diminished.

The Attorney General's complete report was excluded from evidence at the writ hearing upon applicant's objection.

The majority finally faults Styles for his failure to investigate a statement made by Acreman to Peace that Acreman, after he came from the school, stated that applicant was "having fun with a good looking girl." Notwithstanding that this statement *implicates* applicant, the majority suggests that it could possibly be a story created by Acreman to falsely implicate applicant and thus direct the investigation away from someone else. Thus the majority desires that Styles, who testified at the writ hearing that he did not believe the statement when told this by Peace, should have proven to himself that it was unworthy of belief. Again the majority ignores the record. At the writ hearing, Styles testified that he spent a great deal of time on the investigation of this case and that he attempted to eliminate other possibilities. Either the majority can believe or disbelieve this testimony, but requiring Styles to disprove Acreman's statement was a deliberate falsehood created to cover up for someone else by actually finding that other person is an impossible requirement when there are no other possibilities.

Finally, as a matter of reply to the concurring opinion filed herein, I agree that due deference must be paid to the findings of fact and conclusions of law made by the habeas court. But such has never been an absolute rule. See, e.g., *Ex parte Young*, 479 S.W.2d 451 (Tex.Cr.App. 1972), and *Ex parte Guzman*, 589 S.W.2d 461 (Tex.Cr.App. 1979). However, and as emphasized in Judge Campbell's dissent and reiterated herein, even if we take this habeas court's findings as true and accurate, no basis for relief is demonstrated. Furthermore, a reading of all the records including the first trial, second trial, first habeas hearing, and the present hearing leads me to no other conclusion than the findings are clearly erroneous. To tie this Court's hands and deny our Constitutional jurisdiction by requiring us to up-hold erroneous findings of a habeas court is to

return to the "good ole days" when trial courts could legitimately thwart the authority of this Court. See *State ex rel. Wilson v. Briggs*, 351 S.W.2d 892 (Tex.Cr.App. 1961).

For all the reasons set forth above, I dissent.

CAMPBELL, J., joins this dissent.

CAMPBELL, Judge, dissenting.

This is a writ of habeas corpus filed pursuant to 11.07 V.A.C.C.P. Applicant was tried for and convicted of capital murder. He was sentenced to death. This writ application was filed and set to examine three of applicant's seven claims: (1) Whether "Petitioner was denied fundamental fairness and due process of law by the fact that critical evidence having the potential to prove that the applicant is innocent was lost and destroyed while in the exclusive possession of the State;" (2) Whether "The pretrial investigative procedures utilized by the State were so impermissibly suggestive of the applicant that it created false testimony calculated to manufacture circumstantial evidence against the applicant in violation of his constitutional rights to due process of law and a fundamentally fair trial;" and (3) Whether "Texas' death penalty system, as applied, discriminates against black defendants in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution." The majority grants relief on the basis of the second claim, designated as number five in applicant's original petition, without addressing the other two issues. I disagree with the majority's conclusion concerning the second claim and, therefore, must address the other two issues in order to determine whether I believe applicant is entitled to relief. Believing all of applicant's claims to be without merit, I would deny relief.

I.

In the first claim filed and set for consideration, applicant argues that the destruction or loss of several swabs taken from the vagina of Cheryl Fergeson and two Caucasian hairs taken from near the vagina of the deceased deprived him of a fair trial. In his application, he alleges the following:

1.) THE COTTON SWABS;

> Cotton swabs were used to take samples from the victim's vagina shortly after the rape and murder occured [sic]. Semen and live spermatoza [sic] were present on the cotton swabs. Scientific analysis of the substances on the swabs could have proven the innocence of the Petitioner. The cotton swabs were either intentionally or negligently destroyed by the State while in the exclusive possession of the State. They were destroyed before the Petitioner's attorney had an opportunity to have them analyzed.

2.) THE PUBIC HAIRS

> A reddish brown caucasian [sic] pubic hair and another brown body hair of probable caucasian [sic] origin were found near the victim's vagina. Scientific analysis performed by the Texas Department of Public Safety Crime Laboratory established that these two hairs were neither the Petitioner's nor the victim's. Sometime after the conclusion of the Petitioner's second trial, these hairs were lost by the State while in the exclusive possession of the State.

> Because the two caucasian [sic] hairs found near the victim's vagina were "lost" by the State, the Petitioner is now deprived of an opportunity to prove his innocence by scientifically comparing the two hairs with the pubic hairs of the caucasian [sic] murder suspects who have recently surfaced. The loss or destruction of this critical evidence while entrusted to the State of Texas denies the Petitioner his fundamental right to present evidence to prove his innocence.

In response to our order for an evidentiary hearing, the hearing judge entered several findings of fact relevant to applicant's allegations on this point. In regard to the cotton swabs, the hearing judge found that samples of fluids were taken from the vagina of Cheryl Fergeson with cotton swabs; these swabs tested positive for the presence of spermatozoa; no record exist as to when or by whom the samples were destroyed; the swabs were not available shortly after the murder and before applicant's first trial; such swabs have critical evidentiary value; it is possible to determine blood type and other genetic characteristics of a donor from a sperm sample; such test can be used to exclude some rape suspects; it is, and was in 1980, standard procedure to preserve such samples; and there is no valid scientific justification for the destruction of such samples. In regard to the hair samples, the hearing judge found that four hairs were found near the victim's vagina, and one hair was a Caucasian pubic hair that did not belong to the victim or her boyfriend.[1]

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[1]The hearing judge also made findings concerning the State's failure to take blood and hair samples from other possible suspects and the presence of type A blood on the victim's clothing. These findings do not bear on applicant's allegation as plead in his application for writ of habeas corpus. Such allegations, if they had

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In order for the destruction of evidence in the possession of the State to rise to the level of a Due Process violation, a defendant must show that the destruction was the product of bad faith on the part of the State. *Arizona v. Youngblood*, ___ U.S. ___, 109 S.Ct. 333, 337, 102 L.Ed.2d 281 (1988). The findings of fact entered by the hearing judge fail to establish that loss of either the swabs or the hair samples was due to bad faith on the part of the State. Within this context, bad faith would require that the State knew that the items destroyed would have been exculpatory.[2] *Youngblood*,

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been raised in this point, would not merit granting applicant relief.

> In the court meant by this statement that the Due Process Clause is violated when the police fail to use a particular investigatory tool, we strongly disagree. The situation here [sexual assault] is no different than a prosecution for drunk driving that rests on police observation alone; the defendant is free to argue to the finder of fact that a breathalizer test might have been exculpatory, but *the police do not have a constitutional duty to perform any particular tests.*

Arizona v. Youngblood, ___ U.S. ___, 109 S.Ct. 333, 338, 102 L.Ed.2d 281 (1988) (emphasis added); see also discussion of applicant's fifth allegation, *post*.

[2]In his concurring opinion in *Arizona v. Youngblood*, Justice Stevens explains why limiting the Court's holding to "bad faith" cases is ample protection for future defendants.

> [A]t the time the police failed to refrigerate the victim's clothing, and thus negligently lost potentially valuable evidence, they had at least as great an interest in preserving the evidence as did the person later accused of the crime. Indeed, at that time it was more likely that the evidence would have been useful to the police--who were still conducting

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___ U.S. at ___, 109 S.Ct. at 337 n.**; see also *California v. Trombetta*, 467 U.S. 479, 488, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984); *Napue v. Illinois*, 360 U.S. 264, 269, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959). Because applicant does not allege that the State knew the missing evidence was exculpatory and there is no evidentiary support for such an allegation, this claim for relief is without merit.

II.

In the second claim, applicant essentially argues that the prosecution and law enforcement officials instigated an investigation and prosecution founded upon racial bias and prejudice (the so-called "blind focus") that inexorably led to the wrongful conviction of an innocent applicant, violating his due process rights vouchsafed by the 14th Amendment to the U.S. Constitution. The foundation for this claim, however, the bedrock upon which it rests, is what may be loosely termed as newly discovered or available evidence. The "evidence" offered by applicant essentially consists of recantations and recantations of prior recantations of witnesses who testified at applicant's previous trials. Thus, a threshold question arises concerning the nature of applicant's claim and the fundamental issue of cognizability--i.e., whether applicant's "true" claim is cognizable in a post-conviction writ of habeas corpus.

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> an investigation--and to the prosecutor--who would later bear the burden of establishing guilt beyond a reasonable doubt--than to the defendant. In cases such as this, even without a prophylactic sanction such as dismissal of the indictment, the State has a strong incentive to preserve the evidence.

Arizona v. Youngblood, ___ U.S. at ___, 109 S.Ct. at 338 (Stevens, J. concurring).

For the reasons about to be given, I submit that the claim is not cognizable and should not even be entertained by this Court.

The most succinct statement to be found concerning this area of the law was made by the Supreme Court in *Townsend v. Sain*, 372 U.S. 293, 317, 83 S.Ct. 745, 759, 9 L.Ed.2d 770 (1963), viz:

> "where newly discovered evidence is alleged in a habeas application, evidence which could not reasonably have been presented to the State trier of facts, the federal court must grant an evidentiary hearing. Of course, such evidence must bear upon the constitutionality of the applicant's detention; the existence merely of newly discovered evidence relevant to the guilt of a state prisoner is not a ground for relief on federal habeas corpus."

See also, *Anderson v. Maggio*, 555 F.2d 447 (5th Cir. 1977); *Drake v. Wyrick*, 640 F.2d 912 (8th Cir. 1981); *Burks v. Egeler*, 512 F.2d 221 (6th Cir. 1975), *cert. denied*, 423 U.S. 937, 96 S.Ct. 297, 46 L.Ed.2d 270 (1975); *United States ex rel. Whitmore v. Malcolm*, 476 F.2d 363 (2nd Cir. 1973).

The foregoing cases decided by the Supreme Court and the federal circuit courts reflect only federal habeas practice. However, this Court, in a unanimous opinion decided just six years ago, elected to follow the federal courts in this area. See *Ex parte Binder*, 660 S.W.2d 103 (Tex.Cr.App. 1983). In *Ex parte Binder*, supra, this Court held:

> "The basic principle of the state and federal cases heretofore examined, would appear to

> be that the mere raising of a claim of newly discovered evidence is, standing alone, not a fit subject for the exercise of state or federal habeas corpus powers.
>
> * * * *
>
> Applicant is obviously free to pursue any remedies the state *executive* branch has to offer." [my emphasis] 660 S.W.2d at 106

Further, this Court, in *Ex parte Banspach*, 130 Tex.Crim. 3, 91 S.W.2d 365 (1936), over fifty years ago stated:

> "It is well settled by the decision of the Court of Criminal Appeals that the merits of a case involving the guilt or innocence of an accused are not a proper subject of inquiry in a habeas corpus proceeding ... This Court has consistently declined to permit the writ of habeas corpus to usurp the function of an appeal."

Even assuming, arguendo, that applicant can establish a cognizable "blind focus" claim under Art. 11.07, supra, he must do so by showing that these recantations and recantations of prior recantations of trial witnesses produce a violation of applicant's rights that rises to a level of deprivation of due process of law. As I will show, the majority opinion attempts to take these recantations and recantations of prior recantations and wrap them in the more attractive cloak of due process of law and thereby grant applicant relief.

The majority opinion relies heavily on *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), and its progeny and a series of Supreme Court

cases concerning improperly suggestive lineup procedures. I will begin by discussing these two doctrines and what must be proven in order to obtain relief under them; then, I will discuss the facts of this case, both as stated in the majority opinion and as appearing in the record, and show why relief is not proper.

In order to sustain a *Brady* claim, a defendant must not only show that the suppressed evidence was exculpatory, but that it was material in a constitutional sense. *Brady*, 373 U.S. at 87, 83 S.Ct. at 1196-97. The Supreme Court has examined the materiality requirement of *Brady* on several occasions. In *United States v. Agurs*, 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976), the Supreme Court discussed this materiality requirement.

> The Court of Appeals appears to have assumed that the prosecutor has a constitutional obligation to disclose any information that might affect the jury's verdict. That statement of a constitutional standard of materiality approaches the "sporting theory of justice" which the Court expressly rejected in *Brady*. For a jury's appraisal of a case "might" be affected by an improper or trivial consideration as well as by evidence giving rise to a legitimate doubt on the issue of guilt. If everything that might influence a jury must be disclosed, the only way a prosecutor could discharge his constitutional duty would be to allow complete discovery of his files as a matter of routine practice.
>
> Whether or not procedural rules authorizing such broad discovery might be desirable, the constitution surely does not demand that much.

Agurs, 427 U.S. at 108-09, 96 S.Ct. at 2400 (footnote omitted). See also *Moore v. Illinois*, 408 U.S. 786, 795-96, 92 S.Ct. 2562, 33 L.Ed.2d 706 (1972). The Court further clarified this standard in *United States v. Bagley*, 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985).

> [Undisclosed] evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A "reasonable probability" is a probability sufficient to undermine confidence in the outcome.
>
> * * * * * *
>
> The reviewing court[3] should assess the possibility that such effect might have occurred in light of the totality of the circumstances and with an awareness of the difficulty of reconstructing in a post-trial proceeding the course that the defense and the trial would have taken had the defense not been misled by the prosecutor's incomplete response.

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[3]The majority argues that we should defer to the hearing judge's findings if they are supported by the record. However, the majority's authority for this proposition is limited to *factual* findings. I am aware of no authority that would require us to defer to legal conclusions made by a lower court, and the Supreme Court seems to regard the question of materiality as either a legal issue or one of mixed law and fact. Because they have set out this duty for the *reviewing* court, materiality is an issue for us to decide de novo.

Bagley, 473 U.S. at 682-83, 105 S.Ct. at 3384 (emphasis added). See also *Ex parte Adams*, 768 S.W.2d 281, 289-90 (Tex.Cr.App. 1989).[4]

The majority has limited its inquiry into the record to a determination of whether there was some testimony on which the hearing judge could have based his individual findings of fact. While such an approach may be proper in determining whether the findings are "supported by the record," it wholly fails to make the determination of materiality required of us by the United States Supreme Court.

The Supreme Court has adopted a similar standard of materiality for cases in which improper police procedure has produced an unreliable identification. In *Stovall v. Denno*, 388 U.S. 293, 87 S.Ct. 1967, 18 L.Ed.2d 1199 (1967), the defendant was taken to the hospital room of one of his alleged victims. The victim was asked whether the defendant was the man who had killed her husband and attacked her. She positively identified the defendant, and before the Supreme Court, he challenged the identification as being the product of an unconstitutionally suggestive procedure. The Court stated:

> We turn now to the question whether petitioner ... is entitled to relief on his claim that ... the confrontation conducted in this case was so unnecessarily suggestive and conducive to irreparable mistaken identifi-

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[4]In *Adams*, this Court noted that the Supreme Court has applied a different standard to the State's "knowing" use of perjured testimony--whether the testimony might have affected the verdict. 768 S.W.2d at 290. Applicant does not argue that he is entitled to relief based on the State's knowing use of perjured testimony. To this extent, this less-restrictive standard for constitutional error is inapplicable to this case.

> cation that he was denied due process of law.... The practice of showing suspects singly to persons for the purpose of identification, and not as part of a lineup, has been widely condemned. However, a claimed violation of due process of law in the conduct of a confrontation depends on the *totality of the circumstances surrounding it*....

Stovall, 388 U.S. at 301-02, 87 S.Ct. at 1972 (emphasis added); cf. *Foster v. California*, 394 U.S. 440, 442-43, 89 S.Ct. 1127, 1128-29, 22 L.Ed.2d 402 (1969) (repeated lineups in which defendant was the only common suspect held to violate standard set out in *Stovall*). Thus, the question relevant to suggestive investigative procedures is virtually identical to that of "materiality" in a *Brady* setting--was the procedure so unfair that it calls into question our confidence in the verdict. Again, because the majority fails to examine the effort of the suggestive procedures, it overlooks a threshold question necessary to grant applicant relief.

In its opinion, the majority focuses on three factual occurrences in granting relief.[5] First, they

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[5]The majority also expends a significant amount of effort discussing various investigative leads not pursued during the investigation of this crime. The majority characterizes its use of these factors to bolster its position that the investigation was conducted with a blind focus. I disagree with this position.

Clearly, there is no constitutional necessity to exhaust possible leads or to conduct specific scientific tests. *Youngblood*, ___ U.S. at ___, 109 S.Ct. at 338.

By discussing these points the majority does not clarify this case by providing circumstantial evidence of a generally slipshod investigation. Instead, it changes the opinion's focus from whether the pretrial investigative procedures were constitutional, to whether they were, in some subjective sense, "good." Our duty is

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discuss the "walk-through" and the possibility that this procedure was unnecessarily suggestive and caused several witnesses to improperly alter their testimony. Second, they discuss Ranger Style's intimidation of Henry Peace. And third, they discuss Cheryl Bradford's statement to the police that she had seen two white men walking through the gym at the approximate time of the killing. I do not believe that any of these three occurrences rise to the level of constitutional infirmity necessary to warrant relief.

Assuming, arguendo, that the hearing judge's findings of fact are correct[6] and that the majority is correct that the walk-through was conducted in an improperly suggestive manner, the record does not support a conclusion that the effect of the walk-through was constitutionally material. Three of the five janitors on duty the day of the murder went through a joint walk-through of the school with Ranger Styles on August 30, 1980: Gary Acreman, Sam Martinez, and John Sessum.[7] Each of these three men gave written statements before and after the walk-through. Comparison of the pre-walk-through statements with the statements given after the walk-through reveals that the changes in the witnesses' accounts are very minor.

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neither to castigate nor praise the State's investigation in this case. Our job is limited to looking for constitutional error. This discussion of "lost leads" is simply a red herring.

[6]The hearing judge did not make a specific finding concerning the materiality of *any* alleged constitutional errors.

[7]The other two janitors were Henry Peace and applicant. Peace did not participate in the walk-through because of the distance that he lived from the school and because all written statements placed him apart from Acreman, Martinez, and Sessum at the relevant times.

The first thing that one notices when comparing any of the pre and post walk-through statements is that the statements taken after the walk-through are, without exception, longer and more detailed than those taken before the walk-through. This fact does not establish that the walk-through somehow tainted the witnesses' statements. The first set of statements were written by each witness himself. The second set of statements were the product of an interview with the witness by Ranger Styles. It is reasonable to believe that the prodding of Ranger Styles would increase the detail of each statement without compromising the integrity of any witness's account of what he observed. In addition, the mere act of tracing one's steps throughout the day would likely produce greater detail even without pressure to conform one's account with those of the other witnesses. The additional length of the statements does not establish that the walk-through altered any testimony in an improper manner.

Before the walk-through, John Sessum gave the following written statement:

> I come to the school about 8:00 A.M., I rode to work with Gary in his Datsun Pickup, orange and white color. We park in front of the vocational building. We walked over to the main building, the doors were all locked and we waited for Clarence. We waited about 10 or 15 minutes. Sammie [Martinez] came up after we got there and was also waiting. Clarence came down the sidewalk and opened the door. There was another subject Eckie [Henry Peace] a short stocky guy, he also came up about the same time as we did. All five (5) of us then went to the cafeteria and Clarence showed us where to set up the tables and chairs. It took about a

> hour and a half to set up the chairs. When we finished we walked out in the hall to the front of the building. We waited 10 or 15 minutes. There were a couple of people standing in the hall around the end where the gym is. When Clarence came up a girl was coming up behind him. We kidded him about watching out, there is a pretty girl coming up behind him. She had blond shoulder length hair, about 5' tall, she had blue jeans and a pullover sweater on. Clarence told us what we had to do and where to go. The four (4) of us then went to the annex to set up the chairs. Clarence said he had something else to do and stayed behind. We sat in the annex about five (5) minutes, then Eckie went back and got the keys from Clarence. When he got back we set up the tables and chairs. We finished it and it was around 10:30 or 11:00 A.M. Clarence came over and told us it looked good and we could go home. That is when Gary [Acreman] and I left, I do not know when Clarence and the other two left [sic in passim].

Sessum's statement given after the walk-through stated:

> On Saturday, August 23, 1980 I arrived at my job at the Conroe High School somewhere between 7:00-7:30 A.M. I rode in with Gary Acreman. We went to the north side of the building to wait for Clarence Brandley to come unlock the door, because he is the supervisor and is the only one who had a key to the doors. Henry Peace was

also there when Gary and I arrived and a few minutes later, Sammy Martinez got there. We waited approximately fifteen (15) minutes for Clarence. When he got there, he unlocked the door on the north side of Conroe High School and we all went in. Clarence took us (me, Gary, and Sammy) to the Cafeteria and told Henry Peace to buff the floor in the Teachers' Lounge. Clarence then unlocked the door to the lunchroom and told us to put the tables and chairs back in it. Clarence then unlocked the side door of the lunch room that leads into the hallway of the Auditorium area. We finished setting up the tables and chairs around 9:30 A.M., and then came back out through the same door we entered from, and walked down the hallway of the Auditorium area to wait for Clarence to come tell us what to do next. We were waiting just a few feet away from the stairs that lead up to the Choir Room area. There are two restrooms at the top of the stairs--one for ladies and one for men. We stood there for approximately fifteen (15) minutes and saw a white female student with shoulder length blonde hair, wearing blue jeans and a slip-over type shirt, (color unknown) come up the stairs from the gym area. She went on up the other flight of stairs and went into the ladies' restroom. Just as she went into the restroom, Clarence came up the stairs from the gym area. He was carrying several rools of toilet tissue and he started up the other flight of stairs toward the restrooms and Gary hollered at him and told him there was a girl in the restroom He said, "I'm not going in the restroom, you all

go on over to the Vocational Building and start setting it up for a meeting, and I'll be on over." Clarence went on up the stairs and turned right into the direction of the stage of the Auditorium. Gary, Sam, and I started walking on toward the Vocational Building and Henry Peace came out of the Teachers' Lounge with the buffer. He left the buffer there and joined us and we all went to the Vocational Building. We waited in front of the building for approximately forty-five (45) minutes before Clarence came out of the other building. He came out the same door on the north side and walked toward us for a way, then called Henry to come get the key and unlock the door. Henry unlocked the door and we went in. We finished around 11:45 A.M. and Clarence came back over to the Vocational Building and told us that we could go home. Clarence had a white towel around his neck, and I said, "What's the matter? You're sweating too much." Clarence just said, "Ive been working hard. He was acting nervous and trying to hurry us out. Then he asked me for the gray canvas work gloves that I had found in the lunch room when we were working down there, and said they were his, so I gave them to him. He asked me if we were through with the dolly, and I told him "yes", and I went and got it for him. Clarence and Henry then left the Vocational Building and went back toward the other building across the street. On Tuesday, August 26, 1980, Clarence was talking to Gary and me. Gary asked him about the little girl who was killed at Conroe High School on Saturday, and

> Clarence said, "If they start asking me any questions, I'm gonna get me a lawyer" [sic in passim].

The vast majority of differences between Sessum's statement given before the walk-through and the one given soon after can be characterized as being the addition of facts neither present in the first statement nor *inconsistent* with that statement. As discussed above, such changes are not indicative of improper influence. The only differences between the statements which cannot be explained in this manner is the assertion in the second statement that Cheryl Fergeson arrived on the scene before applicant and the placing of him there before her and the amount of time between going to the vocational building and Henry Peace getting the keys from applicant.[8] These differences are of minor importance. The walk-through failed to shake Sessum's testimony that applicant was at the scene of the murder at approximately the time that Fergeson was killed and that applicant was out of the presence of the other janitors for a time sufficient to kill Fergeson and to move her body to where it was found in the auditorium. Thus, the facts essential to the State's case remained the same. Finally, because Sessum did not testify at applicant's second trial, the one in which he was convicted and that now serves as the basis for this writ, the walk-through could not have produced false testimony by this witness.[9]

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[8]One possible explanation for Sessum's account changing the amount of time that they waited at the vocational building for the keys from five to forty-five minutes is testimony that Sessum was napping during this period.

[9]Sessum is not without credibility problems. Since testifying in the first trial, he has recanted his previous version of the facts. He now maintains that Acreman and another man, presumably Robinson, abducted the girl and forced her into the bathroom.

(Footnote continued on next page)

Gary Acreman's first statement, taken before the walk-through, states:

> We were asked to work Saturday. We showed up at 7:30 AM. We started setting up the cafeteria for Monday morning then went looking for Clarence to see what else he wanted us (John, Sam, Icke, and I) to do. As we were coming back from the gym we turned to look behind us and saw a girl, Blonde girl going into the restroom. Clarence showed up with several rolls of toilet tissue we told him that someone was in the girls restroom. He told us to go over to the vocational bld. so we could set up for a meeting for Monday. All four of us went over to the vocational bld. and didn't see Clarence for 45 minutes. We had to wait on him for the key to get in. He called Icke back over across the street and gave him the key and I didn't see Clarence anymore until 11:45 and he told us to go home [sic in passim].

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He attributes his change in testimony to an attack of conscience, and the threats that caused him to testify in this previous manner are no longer as important as being at peace with himself. Regardless of what the truth is, nothing suggests that the walk-through produced these conflicting versions.

Sessum also testified at the writ hearing that he felt intimidated by Ranger Styles to conform his statement to those of the other janitors. Even if this is true, Sessum's failure to testify at the trial underlying this writ precludes applicant from obtaining relief based on Sessum's participation in the walk-through.

The statement taken after the walk-through states:

> On Saturday morning, August 23, 1980, we got to our jobs at the Conroe High School. Clarence Brandley, Samuel Martinez, John Sessum, Henry Peace, and I were working that day. Peace, Martinez, Sessum, and I waited on the bench on the north side of the high school for Clarence. Clarence is the supervisor, and is the only one of the crew who has keys to the doors. Clarence got there around 7:40 A.M. and unlocked the door on the north side of the building and took us to the cafeteria. He told Henry Peace to go buff the floor in the Teachers' Lounge, and told Sammy, John, and I to put all the tables and chairs back in the cafeteria. Then Clarence unlocked the door to the cafeteria from a hallway. Then he went on into the cafeteria and unlocked a side door of the cafeteria that opens into a hallway of the Auditorium area. We finished around 9:30 A.M. or a little later, and John, Sammy, and I left the cafeteria through the same door as we had entered and walked into the hallway area of the Auditorium to wait for Clarnece to give us our next assignment. We stood in the hallway just a short distance from the stairs that go into the Choir Room area. We had been there only two or three minutes when a young white female with medium length blonde hair came up the stairs from the gym area and went on up the stairs to the direction of the restrooms at the top of the stairs. She went into the ladies' room. We saw Clarence coming up the stairs from the gym and he had several rolls of toilet tissue

in his hands. He started on up the stairs to the area of the restrooms, and I told him there was a girl in the ladies' restroom. He said he wasn't going in there and he then told the rest of us to go on over to the Vocational Building and that he would be over in a lit-tle while. Clarence walked on upstairs and turned right and walked toward the door that leads to the stage area of the Auditorium. This was approximately 9:40 A.M. We left and were walking down the hallway and we saw Henry coming out of the Teachers' Lounge with the buffer. He left the buffer there and went with us. The four of us left the building through the same door on the north side as we had entered earlier. We went to the Vocational Building and waited there in front of the building for Clarence to come unlock the door. Between 10:15-10:20, I went back over to the Teachers' Lounge and got a coke. I got the coke and went right back out through the same door on the north side of the building and I didn't see Clarence anywhere in the area around the Teachers' Lounge. When I got back to the Vocational Building, I saw Clarence coming out of the same door on the north side of the building. He walked toward the Vocational Building for a way, and stopped and called Henry to come get the key. Clarence had a white towel around his neck. I had never noticed a towel around his neck before. After he gave Henry the key, Clarence turned and went back into the building through the north side door. Henry unlocked the door and we went on and finished setting up the chairs for the custodial meeting scheduled

for Monday. At about 11:45, Clarence returned to the Vocational Building and told us we could go home. Clarence seemed to be acting different than the last time I had seen him over in the other building. He seemed very nervous and seemed to want us to hurry and go. I did not know what had happened at Conroe High School until Sunday morning when I read it in the Conroe Courier. On Monday, August 25, 1980, the custodial meeting was set for 8:00 A.M. I arrived a little early, and I saw Clarence and Henry there for the meeting. I asked Clarence if he knew what the girl looked like that was found deat at Conroe High School and he said, "All I know is that she had blonde hair." He never said anything else about her. I also talked with Henry before the meeting and was telling him what I had read in the newspaper, and Henry said, "I was the one who found her." He said he found her in the Auditorium, lying behind some plywood. Clarence was standing about five (5') feet from me when I found her. The next time I saw Clarence was Tuesday, August 26, 1980. He told me that he went down to Houston to take a polygraph test. He also said that as far as he knew, he passed it. Clarence also said "If the officers question me anymore about it, I'm going to get me a lawyer." I have noticed that since Saturday, August 23, 1980, Clarence has been acting nervous. I have not worked under him since that day, but I have seen him. Clarence is the night shift supervisor, and is the only one of the crew who has a key to the doors. R.L. Phillips is the day shift supervisor, and is

> the only one of that crew who has a key to the doors [sic in passim].

Each difference between Acreman's first and second statements is merely the inclusion of an additional fact not present in the first statement. As explained above, such additions are not indicative of improper influence and do not call the accuracy of Acreman's testimony into question.[10] The record simply does not support an inference that Acreman's testimony or statements were changed in any way as a result of the walk-through. And, even if one does believe that the walk-through tainted Acreman's testimony to *some* extent, it is absolutely unreasonable to believe that the walk-through "conducted in this case was so unnecessarily suggestive and conducive to irreparable mistaken identification" or testimony. Stovall, 388 U.S. at 301. Such is the high burden set out by the Supreme Court, and applicant does not meet it.

Sam Martinez's first statement, given before the walk-through, states:

> Went to work around 7:35 A.M. in cafeteria to put table and chairs in cafeteria. Fin-

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[10]Like Sessum, Acreman has subsequently changed his story about what occurred on the day of the murder. On March 17 and 20, 1987, Acreman said that he saw Dexter Robinson at the school that day and that Robinson grabbed Fergeson and took her into the bathroom. Since that time, Acreman has again changed his version of events and claims that things happened in the manner that he had previously testified. Nothing in the record suggests that the walk-through is the source of these conflicting statements. When Acreman first recanted, he attributed the difference to a change of heart brought about by his conscience. When he recanted this recantation, he attributed the different story to intimidation on the part of applicant's investigators. While the accuracy of Acreman's testimony is in serious doubt, the doubts do not arise as a result of the walk-through.

> ished in cafeteria sometime between hour of 9:00 A.M. and 9:30 A.M., not sure when. Next went to look for Clarence, found him coming up stairs with two rolls of toilet paper or towel paper. Then saw blonde-headed girl go to the girl's restroom. She had on blue jeans, medium hair. Next we asked Clarence what to do, he told us to go across the street to the Vocational Building. We did, and then we waited about 30 minutes before he came out the mail building and called to the short man to come to get key to the building. Then we set the chairs up there, we finished this, then he came and told us that we were finished, which was about 11:00 A.M. or little after [sic in passim].

In his second statement, Martinez said:

> On Saturday, August 23, 1980, I arrived at by job at the Conroe High School around 7:30 A.M. When I got there, Gary, John and Henry were already waiting. We waited for Clarence Brandley because he is the supervisor and is the only one of us who has a key to the door. Clarence got there around 7:30 A.M. He unlocked the door on the north side of Conroe High School and we all went in. Clarence took me, John, and Gary to the cafeteria, and told Henry to go buff the floor in the Teachers' Lounge. Clarence unlocked the door to the cafeteria and told us to put the tables and chairs back in there. Then he unlocked the side door of the cafeteria that opens into the hallway area of the gym. We set up all the tables and chairs and finished at approximately 9:30

A.M. Then Gary, John, and I came out of the cafeteria through the same door as we had entered, and walked on down the hallway of the Auditorium area to wait for Clarence to give us our next assignment. We waited in the hall just a short way from the stairs that lead up to the choir room. There are also two restrooms at the top of the stairs. The ladies' restroom is the one nearest the stairs, and the other one is for men. We had only been standing there for a few minutes when I saw a girl going up the stairs toward the restrooms. She was a young white female, with shoulder length blonde hair. She was wearing blue jeans and a wide leather belt that looked like a cowboy belt with some type carving, maybe a name on the back. She went on up the stairs and went into the ladies' restroom. Clarence came up the stairs from the gym and was carrying some toilet tissue. He started on up the stairs toward the restroom and Gary hollered out to him that there was a girl in the restroom. Clarence said he wasn't going in the restroom and for us to go on over to the Vocational Building and he would be over in a little while. We started walking on over to the Vocational Building and Henry had finished in the Teachers' Lounge, and he joined up with us. We left the building through the same door on the north side and went across the street to the Vocational Building and waited for Clarence to come unlock the door. We waited for approximately forty to forty-five (40-45) minutes for Clarence to come unlock the door. Sometime after 10:30 A.M., Clarence came out of the building on the north side

> and walked toward the Vocational Building for a short way, and then called Henry to come get the key. Clarence turned around and went back into the building through the north side. Henry unlocked the door and we set up the vocational building for a custodial meeting on Monday, August 25, 1980. We finished the building around 11:30 A.M. and Clarence came in and checked the building and told us we could to home. We started to leave and Clarence told John that the gloves he had found early that morning were his, and that he wanted them. John gave the gloves to him. They were gray canvas type work gloves. Then Clarence got a dolly from the Vocational Building and he and Henry went back over to the other building across the street and went back inside through the north door and I went home [sic in passim].

The two statements of Sam Martinez are essentially identical to those of Sessum, with the exception that Martinez did not change his estimate of the time they waited at the vocational building for keys. The only difference between the two statements, other than in-clusion of additional details, is the order in which ap-plicant and Fergeson arrived at the bathroom. Again, this is a minor difference and does no damage to the essential evidence relied upon by the State. Nothing suggests that the walk-through lead to an "irreparable" influence on Martinez's testimony, as required by *Stovall*, 388 U.S. at 301-02, 87 S.Ct. at 1972-73.[11]

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[11]As noted by the majority, Martinez has since changed certain details in his testimony. Nothing in the record suggests that these changes were related to any corrupting influence of the walk-through.

While there are almost insurmountable credibility problems with the testimony of Acreman and Sessum, which in turn might implicate Martinez's testimony, these credibility problems do not stem from the walk-through. Because of this, applicant should not be granted relief based on the walk-through.

The second factual occurrence that the majority uses to grant relief is Henry Peace's testimony at the hearing that he was intimidated and physically abused by Ranger Styles. Peace's first statement to the police, taken before Ranger Styles arrived in Conroe and the walk-through was conducted, is consistent with a statement later given to Ranger Styles and his testimony at both trials and the writ hearing. In fact, Peace testified at the hearing that he is now telling the truth about what he saw at the school on the day of the murder and that he has told that same story in every statement he has given and on every occasion he has testified. Thus, if Peace is to be believed, as the hearing judge has decided to do, then Style's intimidating tactics did not produce any unreliable testimony. Because of Peace's testimony, this alleged constitutional defect in the investigation is not constitutionally material and entitles applicant to no relief.[12]

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[12]As a collateral matter, not raised in applicant's writ, the majority suggests that the State knowingly used perjured testimony when Peace testified at trial, and they note that the hearing judge found that Peace perjured himself at trial. In order to reverse a conviction because of the use of perjured testimony, the defendant must establish that the perjured testimony was "known to be such by representatives of the State." *Napue v. Illinois*, 360 U.S. 264, 269, 79 S.Ct. 1173, 177, 3 L.Ed.2d 1217 (1959); *Agurs*, 427 U.S. at 103, 96 S.Ct. at 2397. Assuming, arguendo, that this issue is properly before this Court, applicant fails to prove a *knowing* use of perjured testimony.

At the hearing, Peace admitted to having lied twice under oath. At the first trial, he lied about an incident, not connected

(footnote continued on next page)

The final incident relied upon by the majority concerns a statement given by Cheryl Bradford that she observed two men in the gym near the time of the murder. As stated above, to grant applicant relief based on this allegation[13] would require us to find that

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with the murder, in which he showed a fellow janitor a handgun while at school. He said that he had displayed a picture of a gun rather than an actual gun. At the second trial, the State made it known to the jury that Peace had shown a real gun, and the jury heard such testimony directly from Peace. There is nothing to suggest that the State knowingly used this perjured testimony. To the contrary, when the State learned of the inaccuracy they corrected the erroneous testimony in a forthright and candid manner. The Supreme Court has implicitly stated that such a procedure would not violate the constitution. See *Napue*, 360 U.S. at 269, 79 S.Ct. at 1177.

The second incident of perjury has much more serious implications. At trial, Peace was asked standard questions about the voluntariness of his testimony and the absence of any coercion. Peace said he had not been threatened in any way. Prior to trial, however, Peace had complained to the District Attorney's office about Styles physically abusing and threatening him. Thus, when Peace answered these questions, he lied. I do not feel that this incident constitutes the knowing used of perjured testimony. The District Attorney's position has consistently been that Peace's accusations are false. Ranger Styles denies that he threatened Peace, and there is simply no other evidence pointing in either direction. While the record supports the hearing judge's finding that Styles assaulted Peace, it also supports the opposite finding. To this extent, the State has a legitimate argument that they did not knowingly use perjured testimony. Our acceptance of the hearing judge's factual findings does not make those findings true in some objective sense, nor does it mean that all parties, at all times, believed or had knowledge of the facts as determined in Judge Pickett's order. There is no factual basis for the majority's assertion that the State knew this testimony to be false, and the trial judge made no such finding.

[13]Applicant does not allege in his writ that failure to disclose Bradford's statement constituted a *Brady* violation.
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Bradford's statement is exculpatory, to applicant, and is material. *Brady*, 373 U.S. at 87, 83 S.Ct. at 1196-97.

First, I begin by noting that Bradford's statement is not exculpatory. Proof that one or more individuals other than applicant participated in the commission of this offense would not exclude the possibility of applicant's guilt. *Black's Law Dictionary* provides the following definitions:

> **Exculpatory.** Clearing or tending to clear from alleged fault or guilt; excusing.
>
> * * *
>
> **Exculpatory statement.** A statement which tends to justify, excuse or clear the defendant from alleged fault or guilt.

Testimony of the presence of these two men at the gym neither tends to justify applicant's actions nor is it inconsistent with his guilt. Even if the two men participated in the crime, something to which Bradford does not and cannot testify, all evidence still placed applicant at the scene of the crime; applicant was still the only black male at the school who might have been the donor of the hairs on Cheryl Fergeson's body; applicant was still separated from the other janitors at the time the victim's body was placed in the auditorium; and, there would still be evidence that applicant knew the location of the victim's body before it was found by

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Instead, he argues that the failure to investigate the statement is evidence of the blind focus of the State's investigation. As discussed above, failure to explore possible leads is not a constitutional violation. *Youngblood*, ___ U.S. at ___, 109 S.Ct. at 338; see also note 3, *ante*.

Peace. Bradford's ominous testimony that the man she saw in the gym might have been Dexter Robinson does not help applicant because the State did not learn of Robinson's possible involvement until years after applicant was convicted. For these reasons, I do not believe that Bradford's statement was exculpatory.

In addition, even if exculpatory, Bradford's testimony was not material. In order to be material, the majority would have to find that there is a "reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Bagley*, 473 U.S. at 682, 105 S.Ct. at 3383. Instead of undertaking this required analytical step, the majority leaps from a finding that the statement was exculpatory to the conclusion that applicant is entitled to relief. I cannot imagine that the revelation of this minor piece of evidence would have swung this entire prosecution around to an acquittal. I challenge the majority to set out a reasonable scenario in which such a change in result would be more likely than not. Short of such a scenario, the majority should not have granted relief based on this issue.

III.

In the third claim filed and set, applicant alleges facts to support a claim that "Texas' death penalty system, as applied, discriminates against black defendants in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution." Although this claim is based on *McClesky v. Kemp*, 481 U.S. 279, 107 S.Ct. 1756, 95 L.Ed.2d 262 (1987), applicant alleges facts in addition to statistical evidence that black defendants are more likely to receive the death penalty. The hearing judge entered the following findings of fact in regard to this claim:

1. The Petitioner, Clarence Brandley, is a black man.

2. The victim, Cheryl Fergeson, was 16 year old white girl.

3. Dr. Sheldon Ekland-Olson, testified at the evidentiary hearing as an expert witness. Dr. Ekland-Olson is a faculty member at the University of Texas at Austin. He holds a doctorate degree in Sociology and also attended Yale Law School.

Dr. Ekland-Olson conducted a research project which analyzed the application of the death penalty in Texas during the years 1974-83, the first decade of the "new" Texas death penalty statute. Unlike the death penalty statutes in other states such as Florida and Georgia, the Texas statute is a "structured" or "guided discretion" statute, designed to eliminate the racial disparity in the application of the death penalty which the Supreme Court found offensive and unconstitutional in *Furman v. Georgia* [408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972)].

Using data collected from the several hundred Texas capital convictions which occurred during the first decade of the post-*Furman* statute, Dr. Ekland-Olson sought to determine whether Texas' new guided discretion statute was in fact being applied in a nondiscriminatory manner.

After accounting for the significant variables, Dr. Ekland-Olson's analysis of the data revealed the Texas death penalty statute, as applied, has not produced non-discriminatory results. Significant race-linked discrimination exists[,] in that capital cases involving white victims are more likely to precipitate the death penalty than cases involving the black victims.

The research regarding rape homicides in Texas, the offense for which Petitioner was convicted, reveals that the most likely person to receive the death penalty in Texas is a black man convicted of the rape homicide of a white woman. Taking into account all of the various offenses eligible for the death penalty in Texas, and all of the many possible offender/victim racial combinations, the probability of being executed in Texas is increased five fold for a black man convicted of the rape homicide of a white woman.

The research of Dr. Ekland-Olson, establishing that the Texas death penalty statute has produced victim-based racial discrimination, is consistent with the other research done in Texas and throughout the country, particularly the sophisticated Baldus study which the Supreme Court accepted as statistically valid in the *McClesky* case. [481 U.S. 279, 107 S.Ct. 1756, 95 L.Ed.2d 262 (1987)]

4. The jury in Petitioner's first trial was all white. The State had used

peremptory challenges to strike all qualified blacks.

5. The jury in Petitioner's second trial was all white. The State had used peremptory challenges to strike all qualified blacks.

6. At the time of Petitioner's first and second trials, the District Attorneys [sic] Office in Montgomery county utilized several prosecution manuals. The manuals were resource or reference books which instructed the prosecutors on all aspects of how to try a criminal case. The manual recommended that black persons not be allowed to serve on any criminal jury.

7. At the time of Petitioner's first and second trials, a routine or practice existed in the Montgomery County District Attorney's office that all black persons were to be stricken from the jury panel when there was a black defendant. Had any Assistant District Attorney allowed a black person to serve as a juror, the District Attorney, James Keeshan, would have required that assistant to explain why he departed from standard practice by allowing a black person to serve on a criminal jury.

8. No lawyer having practiced in Montgomery County can recall a black person every be-ing permitted to serve on a jury when there was a black defendant, except one instance in 1978 when a black Conroe police officer was allowed to serve on a jury.

9. The jury at Petitioner's first trial ultimately became deadlocked 11 to 1 for conviction. The lone holdout, William Shreck, failed to vote for conviction because he felt that the State had not proven Petitioner's guilt beyond a reasonable doubt. During the deliberations, the other jurors repeatedly called William Shreck a "Nigger [sic] lover." After a mistrial was declared, William Shreck received thousands and thousands of harassing phone calls. During the first month, the harassing calls would arrive every five seconds when the phone was left on the hook. On those occasions when the phone was answered, the caller would exclaim "nigger lover" and then hang up.

In April of 1987, six years after the mistrial was declared, William Shreck applied for the position of purchasing agent for Montgomery County. Of the seventy-odd applicants for the job, William Shreck was selected as one of the several finalists. Mr. Shreck had considerable experience based on the thirty-odd years he was employed as a purchasing agent for an oil company in Houston. As a finalist, the five district judges and the county commissioner of Montgomery County interviewed William Shreck. During the 45 minute interview, approximately 45 minutes was consumed by the judge's questions regarding why Shreck did not vote for conviction at the first Brandley trial in 1980. Judge Keeshan asked many of the questions. The district judges then told William Shreck that his "not guilty" vote at the first trial

demonstrated that he could not get along with people. The judges denied Mr. Sreck the job.

10. Shortly after the victim's body was found on August 23, 1908, a white Conroe police officer had a conversation with Henry Peace regarding who perpetrated the murder. The officer then turned towards Clarence Brandley and announced to Peace that "The nigger was elected."

11. Prior to Petitioner's first trial, Petitioner's attorneys approached the Sheriff of Montgomery County, Gene Reaves, to post Petitioner's bond. Bond had been set at Thirty Thousand ($30,000.00) Dollars and Petitioner's attorneys had good and sufficient surety to make the bond. The Sheriff refused to accept the bond, however, stating that "The little Nigger [sic] doesn't belong on the ground." District Attorney James Keeshan was present and agreed, echoing the Sheriff's phrase that the "little Nigger [sic] doesn't belong on the ground."

After both Sheriff Reaves and District Attorney Keeshan made their intentions clear that they didn't want the "little Nigger [sic]" to make bond, Keeshan met with Judge Lee Alworth without any notice to defense counsel. Judge Alworth thereafter signed an ex parte order prepared by Keeshan which raised Petitioner's bond to Seventy Thousand ($70,000.00) Dollars.

12. Racial considerations infected the atmosphere within the courtroom during Petitioner's trial. Many members of the public, both black and white, attended Petitioner's trial. The Montgomery County Sheriff's Department treated the black spectators differently, however. When a black person exited the courtroom during trial, one of the numerous sheriff's deputies on hand would follow the black person from the courtroom and keep the person under observation. An elderly black gentlemen, Reverend J.J. Robinson, pastor of the Mt. Hebron Baptist Church in Houston, was even followed by a deputy when he went to the restroom.

Several witnesses testified at the evidentiary hearing that a powerful feeling of prejudice and racial tension pervaded the courtroom. Judge Martin's secretary, Janet Dial, heard an elderly white woman openly repeat to herself in the courtroom, but plainly audible to others, "Kill the nigger, kill the nigger . . ." The sheriff's deputies allowed the woman to remain in the courtroom.

The Reverend Anderson Davis, a highly educated person in his middle 60's, testified that of the many trials that he has personally witnessed over the years in the State of Texas, Georgia, Virginia and Tennessee, on only one other occasion did he experience a trial where the racial tension in the courtroom compared to that of the Brandley Trial. That trial was in Chattanooga, Tennessee in 1946 when a

prosecution witness stated, without reproach from the court, that he knew three things about "niggers": They all lie, steal and smell.

The tone of the courtroom, as fostered by the District Attorney's Office, the Judge and the District Clerk's office, was against black. One example of this white against black atmosphere is evident in the in-chambers discussion during the penalty phase, where the district attorney complains to the trial judge that a black woman had sat on a white woman's hand. District Attorney Keeshan further reveals his personal white versus black posture when he suggests that if any announcements to the audience are necessary, he will make an announcement to the white people and Petitioner's attorney could make an announcement to the black people. Wholly apart from the judge's legal rulings, the demeanor and attitude of the judge was hostile to the Petitioner and the black members of the audience. The Reverend J.J. Robinson testified that the judge's attitude towards Petitioner and the black people in the audience clearly revealed the judge's partiality in the case. The Reverence did not feel comfortable even being in the courtroom.

13. During petitioner's second trial, a "team-like" or "company" atmosphere existed at the court-house between Judge Martin's staff, the District Attorney's Office and the District Clerk's office. The "project" or "goal" of the team was to convict

the Petitioner. Employees of Judge Martin's staff and the District Clerk's Office felt pressure to be team players and were too intimidated to act impartially towards Petitioner or to even voice any suggestion regarding Petitioner's possible innocence.

The "project-like" atmosphere pervaded the courthouse during Petitioner's second trial. The atmosphere existed even after the conviction, as evidenced by the agreement, between Judge Martin, the District Attorney and the District Clerk, to keep secret the fact that critical exhibits had become missing. A sordid instance where the "project like" mentality overbore any sense of justice and decency at the courthouse can be seen in the conduct of the District Clerk and the District Attorney when Attorney Don Brown began inquiring about the missing trial exhibits. When Don Brown informed District Clerk Peggy Stevens that he was going to ask District Attorney Keeshan about the missing exhibits, Peggy Stevens rushed to warn Keeshan at his office. Keeshan and Peggy Stevens then hid in the district attorney's office and laughed when Don Brown arrived and the District Attorney's secretary got rid of him. The "project-like" atmosphere culminated on November 22, 1985, when Judge John Martin, at the special request of District Clerk Peggy Stevens, set Petitioner's execution date for January 16, 1986--the District Clerk's birthday. (It should be noted that Judge Martin had no authority to even set Petitioner's execution date, let alone set the execution to coincide

> with the District Clerk's birthday celebration. Judge Martin had no authority because he had voluntarily recused himself from further handling of petitioner's case in March, 1982, after defense counsel had confronted the Judge, on March 5, 1982, with the knowledge that the Judge had conducted ex parte meetings with the District Attorney regarding Petitioner's case.)
>
> Based on the demeanor of Judge John Martin the two occasions that he testified, and the credibility determinations that the Court made regarding other witnesses at the evidentiary hearing, the Court finds that Judge Martin's testimony, perhaps tempered by a motive for self-preservation, was simply not credible.

In *McCleskey*, a man in Georgia who had been sentenced to die challenged that state's capital sentencing process on the grounds that the killers of whites are more likely to be given a capital sentence than the killers of blacks.

> As a black defendant who killed a white victim, McCleskey claims that the Baldus study demonstrates that he was discriminated against because of his race and because of the race of his victim. In its broadest form, McCleskey's claim of discrimination extends to *every actor in the Georgia capital sentencing process,* from the prosecutor who sought the death penalty and the jury that imposed the sentence, to the State itself that enacted the capital punishment statue and allows it to remain in effect

> despite its allegedly discriminatory application.

McClesky, 481 U.S. at 292, 107 S.Ct. at 1766 (emphasis added). The United States Supreme Court rejected the defendant's reliance on solely statistical evidence for this proposition.[14] In reaching this result, the Court set out what is necessary to establish a "*McCleskey*" equal protection claim. First, a defendant must establish "the existence of purposeful discrimination." *McClesky*, 481 U.S. at 292, 107 S.Ct. at 1766. Second, a defendant must make a more particularized showing that "the decision makers in *his* case acted with discriminatory purpose." *Id.*

Although there are few procedural barriers to proving an equal protection claim, the quantum of evidence necessary to sustain such a claim is high.

> Implementation of these [capital punishment] laws necessarily requires discretionary judgments. Because discretion is essential to the criminal justice process, *we would demand exceptionally clear proof before we would infer that the discretion has been abused* [or tainted by racial considerations].

McCleskey, 481 U.S. at 297, 107 S.Ct. at 1769 (emphasis added). In weighing the sufficiency of applicant's evidence in support of this claim, I will jointly consider

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[14]Applicant's equal protection claim is as broad in scope as that rejected in *McCleskey*. We wish to note, however, that his argument and supporting evidence goes much farther than that of the defendant in *McCleskey*. Applicant not only provided a study which supported the findings of the Baldus study, relied upon in *McCleskey*, but he introduced other types of evidence suggesting the presence of racial discrimination in his particular case.

all evidence which serves to support a type of equal protection violation. In other words, I will consider jury selection, official bias, racial tensions within the courtroom and community, etc.[15] I will consider the factual findings made by the hearing judge in the order they were entered on Judge Pickett's order.

The first two factual findings were that applicant was a black man and that the victim, Cheryl Fergeson, was a 16 year old white girl. These two facts, standing alone, do not establish a claim which would entitle applicant to relief.

The third finding of fact concerned a study conducted by Dr. Sheldon Ekland-Olson indicating that a black man who rapes and kills a white woman is five times more likely than any other person who commits an offense that could be charged as capital murder to receive a death sentence. The hearing judge found the statistical evidence to be credible and persuasive.[16] The

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[15]The evidence in support of any given type of equal protection violation need not be sufficient to constitute an independent constitutional violation. For example, the facts in the record may or may not be sufficient to entitle applicant to relief under *Swain v. Alabama*, 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965). Regardless of the sufficiency of the facts to support a claim under *Swain*, those facts are relevant to applicant's contention that race was a factor in the entire proceeding against him. The totality of factors present in the trial underlying the instant cause are relevant to applicant's claim irrespective of the sufficiency of any individual factor. See *Batson v. Kentucky*, 476 U.S. 79, 96-97, 106 S.Ct. 1712, 1723, 90 L.Ed.2d 69 (1986); *Washington v. Davis*, 426 U.S. 229, 241-42, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976).

[16]Unlike the showing of a prima facie case of discrimination in a *Batson* setting, introduction, and even acceptance, of such statistical evidence requires no rebuttal on the part of the State absent additional and stronger evidence of discrimination. McCleskey, 481 U.S. at 296 n.17, 107 S.Ct. at 1768-69 n.17.

author of the study admitted, however, that this evidence failed to prove whether *applicant* was the victim of racial discrimination. Despite this limitation, Dr. Ekland-Olson's study and testimony establish a risk that applicant was the victim of racial discrimination. This statistical risk may be used as some circumstantial evidence to support applicant's claim. See *McCleskey*, 481 U.S. at 291 n.7, 107 S.Ct. at 1766 n.7.

The fourth through eighth findings of fact establish the racial composition of the juries in applicant's two trials for this offense;[17] the existence of a trial manual in the Montgomery County District Attorney's office which instructed prosecutors to exclude all blacks from criminal juries; that, at the time of applicant's trial, the Montgomery County District Attorney's office had a policy of excluding blacks from criminal juries and; that violation of this policy would require explanation to the elected District Attorney; and that no lawyer could remember the presence of a black on a criminal jury other than one Conroe police officer in 1978. Applicant argues that, taken together, these facts constitute proof that the juries in his case were selected in an unconstitutionally discriminatory manner.

First, we begin by noting that the racial composition of the jury at applicant's first trial could never provide a direct basis of relief from his conviction at the second trial. The remedy available when a defendant proves that his jury was selected in a discriminatory manner is a new trial. The remedy for

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[17]Applicant's first trial for the offense underlying this writ application ended in a mistrial because the jury was deadlocked on the issue of guilt/innocence. Applicant was convicted of capital murder and sentenced to death as the result of his second trial. Applicant is challenging the conviction arising from his second trial in the instant cause. The juries in both trials were all-white.

such a constitutional violation is reversal of the conviction, not a judgment of acquittal. *E.g., Whitus v. Georgia*, 385 U.S. 545, 553, 87 S.Ct. 643, 648, 17 L.Ed.2d 599 (1967). Because applicant's relief would not have barred reprosecution,[18] he was only entitled to a second trial, something he already received by virtue of the first mistrial. Thus even a valid claim concerning the first trial would not entitle applicant to anything he has not already received.

Second, the jury in the second trial was all-white and the State used peremptory challenges to remove blacks from the panel. This factual finding might, if it arose in a direct appeal, make a prima facie case that discrimination occurred in the jury selection process and entitle applicant to a hearing at which he could question the prosecutor on his use of peremptory challenges. *Batson*, 476 U.S. at 79, 106 S.Ct. at 1712. However, the Supreme Court has refused to extend the relaxed evidentiary burden of *Batson* to convictions that were final when *Batson* was decided. *Allen v. Hardy*, 478 U.S. 255, 106 S.Ct. 2878, 92 L.Ed.2d 199 (1986). Thus, in order for the jury selection process to rise to the level of an equal protection violation, applicant must satisfy the greater burden of proof set out in *Swain*, 380 U.S. at 223-26, 85 S.Ct. at 837-39.

In order to establish an equal protection violation under *Swain*, a defendant must prove purposeful discrimination in his trial, *Id.* at 223-24, 85 S.Ct. at 837-38, and establish that the State's attorney in his trial has been guilty of discrimination in other cases. *Id.* at 225-26, 85 S.Ct. at 838-39. The reason for this dual burden is the presumption that the United States

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[18]Cf. *Burks v. United States*, 437 U.S. 1, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978); *Greene v. Massey*, 437 U.S. 19, 98 S.Ct. 2151, 57 L.Ed.2d 15 (1978).

Supreme Court established that a prosecutor exercised his peremptory challenges in good faith. *Swain*, 380 U.S. at 222, 85 S.Ct. at 836-37.

Here, applicant has shown that blacks were excluded from his jury and that the State used peremptory challenges against the black veniremen. Such a showing may rebut the presumption of good faith on the part of a prosecutor. *Swain*, 380 U.S. at 222, 85 S.Ct. at 836-37. Such a showing, however, does not, by itself, establish purposeful discrimination within the first requirement of *Swain* nor past discrimination on the part of the prosecutor, as required in the second part of *Swain*. *Id.*

Applicant introduced evidence concerning a number of other facts related to jury selection which can be used to satisfy *Swain's* requirements for additional proof. Applicant introduced evidence, and this evidence was accepted by the hearing judge, that the Montgomery County District Attorney's office used a manual which advised prosecutors to exclude blacks form criminal juries. Such a fact is probative of discriminatory intent on the part of the district attorney's office. *Batson*, 476 U.S. at 105, 106 S.Ct. at 1727-28 (Marshall, J. concurring).

In addition, applicant introduced evidence, once again accepted by the hearing judge, that District Attorney Keeshan had a policy of excluding blacks from juries and that failure to follow this policy would require that an explanation be made to Keeshan.[19] This

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[19]The hearing judge's finding that there was a policy in the Montgomery County District Attorney's office is somewhat misleading. Frank Robbin, the witness upon whom the hearing judge based this finding, testified that it was his opinion that failure to challenge all blacks would require an explanation to Keeshan. *(footnote continued on next page)*

testimony would seem to establish that the prosecutor in applicant's case has used peremptory challenges in the past to exclude blacks, thus satisfying the second requirement of *Swain*. 380 U.S. at 226, 85 S.Ct. at 839. Finally, applicant introduced testimony that at least one witness remembered only one black, a Conroe police officer, who had ever served on a criminal jury in Montgomery County. This evidence is only circumstantial evidence of applicant's contention that jury selection in Montgomery County is tainted by racial

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(footnote continued from previous page)

Q: [By Mr. DeGeurin] Now, if you were, while you were working for Judge Keeshan, then District Attorney Keeshan, if you were to allow a Black to remain on the jury where you had a Black defendant, what would you expect Mr. Keeshan to do?

A. Certainly, that would have been highly unusual. I don't recall it ever being done but I'm certain that Jim [Keeshan] would have asked why, what was your reasoning. What was the reason for leaving this particular juror as opposed to using a peremptory challenge.

Q. Do I understand then that as Assistant District Attorney, you would have to explain why you would do such a stunt as to leave a Black man on the jury where you had a Black defendant?

A. He'd want to know why, he'd want some explanation. I'm not saying that there may have been an explanation that satisfied him, but that was highly unusual and he would have wanted to know why.

Thus, this testimony supports an inference of a de facto policy to discriminate against black veniremen and defendants; however, the existence of a de jure policy is not supported by the record.

consideration. Because defense attorney's can, and do, challenge black veniremen, the absence of blacks on past juries does not establish that the State is solely responsible for this historic phenomenon. *Swain*, 380 U.S. at 223-24, 85 S.Ct. at 837-38.

The evidence adduced by applicant would appear to make out a prima facie case under *Swain*, and the hearing judge rejected the State's rebuttal evidence on this issue. Applicant does not, however, claim that he is entitled to relief under this theory. Instead, applicant uses the facts surrounding the jury selection in order to support a general claim that racial discrimination influenced the decision makers in this trial. We agree with applicant that these facts support an *inference* [emphasis mine] of discriminatory intent.

The ninth finding of fact states that the lone juror who voted to acquit applicant in the first trial, William Shreck,[20] was the victim of racially motivated harassment after the declaration of a mistrial. The record clearly supports a finding that Shreck received phone calls reflecting racial animus, and from these calls, one could infer that this animus extended to some portion of the local population. This evidence, however, does have its limitations. Shreck knew neither how many people were involved in making the telephone calls nor who the people were. Thus, these incidents serve as only a crude barometer of the public climate. We agree with applicant that these calls serve as some indication that racial hostilities were at work in Conroe, but our inability to judge the extent to which these incidents reflected popular opinion at the time of applicant's second trial and the speculative inference

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[20]The statement of facts spells this former juror's name "Sreck," and the findings of fact designate him as "Shreck." I am unable to determine which is the correct spelling.

about what degree of popular opinion might have affected the course of the trial, prevents me from giving this evidence more than token significance.

Shreck's remaining testimony concerned his failed attempt to secure employment with Montgomery County and Keeshan's hostile attitude toward him. While the record supports the finding that Keeshan was hostile to Shreck, there is no indication that Keeshan's feelings were racially motivated. I find it equally plausible that Keeshan resented Shreck for necessitating a second trial. This resentment over lost effort and the expense and trouble of a second trial provide a race neutral explanation of Keeshan's actions at the job interview. There is no necessity to look beyond the record and into Keeshan's soul and find that he was motivated by race in this instance.

The tenth finding of fact concerns a police officer's statement to Henry Peace concerning who perpetrated the murder. The officer said, referring to applicant, that "The nigger was elected." On its face, this statement reflects racial animus on the part of one of the State's investigators. An examination of the context of the statement, however, suggests that the statement is less indicative of a racially motivated investigation than would appear at first blush. The testimony concerning this incident reveals:

> Q: (By Mr. DeGeurin) Mr. Peace, let me repeat my question as best I can. After you, when you and Clarence Brandley first spoke to any police officer, did any police officer indicate to you who a suspect would be in the case?
>
> A: Yes, sir.

Q: Can you tell the Court what was said to you by the police officer?

A: Yes, sir. I was on the left hand side and . . .

Q: Just take you time, Mr. Peace.

A: I don't remember which side I was on now. I can tell what you [sic] the police officer did say, though.

Q: What did he say?

A: He told me that I wasn't strong enough or tall enough and that they had a lot of pressure put on them and Mr.--Well, they called him--

THE WITNESS: Your Honor, can I say when [sic: what] they called him?

THE COURT: Yes, sir.

A: (Continuing) They said that the nigger was tall enough and strong enough and he was elected.

* * * *

Q: The answer was?

A: I said that they did say that the nigger would be the one that was elected or is elected or something like that.

Q: Did he also say to Mr. Brandley in your presence, You're a colored guy, Conroe doesn't like colored people, so nigger, you're elected?

A: I don't remember that.

Although the police officer's statement that "the nigger is elected" shows the grossest of racial insensitivity, the context of the statement indicates that applicant was "elected" because of his physical ability to commit the crime, not his race. Although Peace's testimony raises a very strong inference that the police officer in question was a racist, it also illustrates that his focus on applicant as a suspect was grounded in legitimate and race-neutral reasons. This incident fails to establish that any decision maker was swayed in the exercise of his discretion by racial considerations. Thus, this factor does not contribute to applicant's claim under *McCleskey*.

In further support of his *McCleskey* claim, applicant complains that his initial bond was set at $30,000. Applicant attempted to post bond but the Sheriff of Montgomery County refused to accept the bond. An ex parte order was issued by Judge Alworth, raising the required bond to $70,000. In particular, applicant complains that the testimony at the evidentiary hearing revealed that the Sheriff of Montgomery County, Gene Reaves, and James Keeshan, opposed applicant's posting of bond because of his race. When applicant attempted to post bond, Sheriff Reaves stated that "the little Nigger [sic] doesn't belong on the ground." District Attorney Keeshan acknowledged that he was present when the sheriff used this phrase, but he denied using this phrase himself. Keeshan subsequently met with Judge Alworth without notice to defense counsel. The ex parte order raising the required bond

amount was issued after this meeting. Judge Pickett found in favor of the applicant on these disputed facts.

Applicant was subsequently convicted after the allegedly wrongful denial of bond. Because of applicant's subsequent conviction, this issue is moot and provides no independent avenue for relief to applicant. *Wheeler v. State*, 496 S.W.2d 85 (Tex.Cr.App. 1973); *Waddle v. State*, 482 S.W.2d 647 (Tex.Cr.App. 1972).

The twelfth finding of fact sets out some evidence that the courtroom atmosphere at applicant's first trial was charged with racial tension. However, this evidence does not show that any decision maker was affected by this tension. An example of the shortcomings of this evidence is the testimony of Janet Dial.

Her testimony provided the basis for the finding that a woman was saying "kill the nigger, kill the nigger. . . ." While Dial testified that a woman in the back of the courtroom said this, she could not say whether any member of the jury could hear the statement. Similarly, Rev. Robinson's testimony concerning deputies following black spectators from the courtroom fails to establish that the jury was aware of this practice or that it affected any of the participants in any way. I am unable to assign a definite degree of weight to this evidence because of the grossly speculative nature of the inferences required.

The thirteenth finding of fact concerns the "team-like" attitude between the prosecutor's office and court personnel. I feel that this evidence should be treated identically to that concerning Keeshan's conduct at Shreck's job interview. While the testimony suggests improper conduct on the part of court staff, it fails to establish that any of this behavior was motivated by racial considerations. Absent a showing that

links their actions to race, this evidence should not be considered in regard to a claim under *McCleskey*.

I would reject the hearing judge's finding that:

> the color of Clarence Brandley's skin was a substantial factor which pervaded all aspects of the State's capital prosecution against him, and was an impermissible factor which significantly influence the investigation, trial and post trial proceedings of Petitioner's case.

The record in this cause simply does not establish "exceptionally clear proof" of applicant's claim as required by *McClesky*. Applicant should be denied relief under this claim.

For all of these reasons, I dissent.

McCORMICK, P.J., and W.C. DAVIS, J., join in this opinion.

89-1887 (3)

FILED
MAY 29
JOSEPH F. SPANIOL, JR.
CLERK

No. _____

IN THE
UNITED STATES SUPREME COURT
OCTOBER TERM, 1989

THE STATE OF TEXAS,
Petitioner,

v.

CLARENCE LEE BRANDLEY,
Respondent.

On Petition For Writ Of Certiorari
To The Texas Court Of Criminal Appeals

APPENDICES B, C, D, AND E

PETER C. SPEERS, III
District Attorney
Ninth Judicial District of Texas
Montgomery County, Texas

Montgomery County Courthouse
Room 125
Conroe, Texas 77301
(409) 539-7800

APPENDIX B

OFFICIAL NOTICE
COURT OF CRIMINAL APPEALS

January 17, 1990

RE: Case No. 70,719 212TH DISTRICT COURT-87CR0769

STYLE: Brandley, Ex Parte Clarence Lee

On this day the State's Motion for Rehearing was denied.

(PRESIDING JUDGE MCCORMICK & JUDGES DAVIS & CAMPBELL WOULD GRANT)

Thomas Lowe, Clerk

Court of Criminal Appeals
P.O. Box 12308, Capital Station
Austin, Texas 78711

MAIL TO: Peter C. Speers III
District Attorney, 9 J. D.
County Courthouse
Conroe, TX 77301

APPENDIX C

Commonwealth v. Troy, 540 N.E.2d 162 (Mass. 1989)

The State's careless destruction of defendant's blood sample, which the defendant submitted to State laboratories to be tested for the presence of drugs, was not violative of due process because even demonstrable intoxication was not a defense to the specific intent crimes of which the defendant was convicted.

Madison v. State, 534 N.E.2d 702 (Ind. 1989)

Investigating police officers' failure to test victim's knife for fingerprints did not deny defendant due process.

House v. State, 535 N.E.2d 103, 111 (Ind. 1989) (concurring opinion)

Failure to disclose statements, relating to person who was a suspect at one point in time, did not violate due process where evidence of defendant's guilt was overwhelming.

Sigler v. State, 541 N.E.2d 944 (Ind. 1989)

Defendant's due process rights not violated by an "incompetently conducted" crime scene investigation or the failure of the police to test physical evidence.

State v. Seifert, 557 A.2d 494 (Vt. 1989)

In arson case, destruction of defendant's clothing did not violate due process because the destruc-

tion was not done in bad faith and the clothing possessed no "apparent" exculpatory value.

State v. Lindsey, 543 So.2d 886 (La. 1989)

Inadvertent or unexplained destruction of photographic spread used by police to obtain eyewitness identification of murder defendant did not violate defendant's due process rights.

State v. Fain, 774 P.2d 252 (Idaho 1989)

In prosecution for first degree murder, failure to preserve fluid sample swabs did not violate due process.

State v. Berkeley, 567 A.2d 915 (Me. 1989)

Destruction of soil samples in arson case did not violate due process where the defendant had opportunity to obtain comparable evidence from other sources and failed to show that the samples were destroyed in bad faith.

State v. Tanner, 449 N.W.2d 586 (Neb. 1989)

Absent showing of bad faith, failure to preserve dependant's blood sample in a prosecution for driving while intoxicated did not violate due process.

State v. Joncas, 554 A.2d 841 (N.H. 1989)

Failure to make, or negligent destruction of, police investigative report did not violate due process.

State v. Dechaine, 572 A.2d 130, (Me. 1990)

Defendant's due process rights not violated by State's complete consumption of fingernail scrapings taken from victim, even though such use made it impossible for the defendant to obtain independent tests.

State v. Matafeo, 787 P.2d 671 (Haw. 1990)

Destruction of clothing of sexual assault victim did not violate due process.

People v. Holmes, No. 68448, 1990 WL 4091 (Ill. 1990)

Inability to locate "material" informant, through no fault of the State, did not infringe defendant's due process rights.

Arizona v. Sema, 787 P.2d 1056 (Ariz. 1990)

Government's failure to interview a witness before the witness was deported did not violate due process.

People v. Wyman, 788 P.2d 1278 (Colo. 1990)

Due process rights of a defendant, charged with murder in connection with driving while under the influence of a controlled substance, were not violated by the failure of the police to preserve a sample of the defendant's blood.

Hammond v. State, 569 A.2d 81 (Del. 1989)

In vehicular homicide case, defendant's due process rights were not violated by the failure of the police to preserve the crash vehicle or to examine

the vehicle for blood, clothing, tissue, or fingerprints, in light of overwhelming evidence of the defendant's guilt.

Kordenbrock v. Scroggy, 889 F.2d 69 (6th Cir. 1989)

No due process violation found where the police destroyed a photographic array used by eyewitness in making an identification of the defendant, misplaced a vial of pills that the defendant hoped to use in presenting a defense of diminished capacity, and erased a tape recording of the defendant's confession. "Any doubt that the state's failure to preserve these pieces of evidence did not amount to a denial of due process was put to rest by the Supreme Court in *Arizona v. Youngblood*." *Id.* at 86.

Balfour v. Haws, 892 F.2d 556 (7th Cir. 1989)

The State's failure to preserve photographs of the defendant's reenactment for police of his confrontation with the murder victim did not violate due process.

United States v. Rastelli, 870 F.2d 822 (2nd Cir. 1989)

The government's loss of three allegedly exculpatory tape recordings of conversation by a government witness and of certain bid documents did not infringe the defendant's due process rights. "[T]he record is barren of proof that the government lost the evidence in bad faith. On this ground alone the missing evidence claim must fail." *Id.* at 833.

Mitchell v. Goldsmith, 878 F.2d 319 (9th Cir. 1989)

In a prosecution for sexual assault, the state's failure to preserve a semen sample, failure to perform a PGM test on the semen sample, and failure to preserve a photographic lineup that did not include the defendant did not violate the defendant's due process rights because the defendant failed to show bad faith police conduct.

United States v. Van Griffin, 874 F.2d 634 (9th Cir. 1989)

Defendant charged with driving while intoxicated had no due process right to require the governement to give him urine and blood tests.

United States v. Galvan-Garcia, 872 F.2d 638 (5th Cir. 1989)

Absent a showing of bad faith, the DEA's destruction of marihuana did not deprive the defendant of due process of law.

Miller v. Vasquez, 868 F.2d 1116 (9th Cir. 1989)

Because the failure of the police to preserve evidence does not violate due process in the absence of bad faith, the failure of the police to collect the victim's blood stained jacket or to photograph the defendant's scratched arms likewise could not violate due process absent a showing of bad faith police conduct.

Redman v. Dugger, 866 F.2d 387 (11th Cir. 1989)

The due process rights of a murder defendant were not violated where the state allowed the

murder victim's wife to allegedly destroy evidence, lost or suppressed a gun holster, failed to preserve fingerprints on the murder weapon, and failed to test the victim for gunpowder residue. Although the defendant claimed self defense, the undisputed evidence showed that the defendant and the victim struggled over the gun.

United States v. Sherlock, 865 F.2d 1069 (9th Cir. 1989)

The defendant's due process rights were not violated by the loss of a rape kit test.

Colon v. Kuhlman, 865 F.2d 29 (2nd Cir. 1988)

In the absence of bad faith, the defendant's due process rights were not infringed by the failure of the police to preserve enough of a sample to test for blood type or to preserve the victim's underwear, or by the state conducting scientific tests that rendered slide samples useless for additional tests that the defendant wished to have performed on the samples.

APPENDIX D

Clarence Lee BRANDLEY, Appellant,

v.

The STATE of Texas, Appellee.

No. 68850.

Court of Criminal Appeals of Texas,
En Banc.

May 8, 1985.

Rehearing Denied June 6, 1985.

[691 S.W.2d 699]

Before the court en banc.

OPINION

W.C. DAVIS, Judge.

A jury found appellant guilty of capital murder and answered the special issues under Art. 37.071(b), V.A.C.C.P. affirmatively, whereupon the court assessed the mandatory penalty of death. Appellant raises fifteen grounds of error, including a challenge to the sufficiency of the evidence to support the verdict of guilt.

Appellant also challenges the sufficiency of the evidence adduced at a previous trial of the same offense. That trial resulted in a mistrial when the jury could not reach a unanimous decision on guilt or innocence. Appellant contends that the retrial violates his due process and double jeopardy rights under the United States and Texas Constitutions because the evidence at the first trial was insufficient to support a verdict of guilt. In *Richardson v. United States*, ___

U.S. ___, 104 S.Ct. 3081, 82 L.Ed.2d 242 (1984), the defendant raised a double jeopardy claim after his first trial resulted in a mistrial due to the inability of the jurors to agree. The defendant argued that the evidence presented at the first trial was insufficient and that retrial was therefore barred by *Burks v. United States*, 437 U.S. 1, 98 S.Ct. 2141, 57 L.E.2d 1 (1978). The Supreme Court disagreed, holding that jeopardy does not terminate when the jury is discharged because it is unable to agree, and that, therefore, the sufficiency of the evidence presented at the first trial need not be reviewed.

Under the authority of *Richardson*, supra, we will not review the sufficiency of the evidence presented at appellant's first trial.

Appellant also challenges the sufficiency of the evidence presented during the instant trial.

The evidence is circumstantial. The victim was the sixteen-year old manager for the Bellville High School girls' volleyball team. She, the players, and the coach arrived at Conroe High School at 9:10 a.m. on Saturday, August 23, 1980 for a scrimmage; they entered an annex gym to begin warming up before their scheduled match. The victim put down the volleyballs, the scorebook, and her purse, and left the gym. Her body was found in the loft area above the stage in the auditorium at about 11:30 a.m.; she had been raped and strangled.

Gary Acreman, Henry Peace, John Sessum and Sam Martinez were janitors who worked at Conroe High School on August 23, 1980. Sessum did not testify. The other three testified to substantially the same facts. They had arrived at the school close to 7:30 a.m. Their supervisor, appellant, arrived about ten

minutes late, around 7:40. Appellant unlocked the doors to the main building and directed all the janitors except Peace to set up chairs in the cafeteria. Appellant told Peace to spray-buff the teacher's lounge, and helped him to carry the buffer up to the lounge. Acreman, Sessum, and Martinez finished setting up the chairs between 9:00 and 9:30. They left the cafeteria and waited for appellant in the hallway between the auditorium and the cafeteria. While there, they saw a girl matching the victim's description come from the gym area, walk up the stairs, and go into the restroom near the auditorium.

Appellant followed behind the girl by a few minutes, carrying rolls of toilet paper in his hands. As appellant started up the stairs toward the restroom, Acreman told him a girl was inside. Appellant said he was not going to go in, and told the three janitors to get Peace and go across the street to the vocational building; he would be there in a little while. Appellant then entered a janitor's closet near the restroom.

The three janitors left. They met Peace as he was coming out of the teacher's lounge, and all four walked across the street to the vocational building. The building was locked; they waited for appellant, who had the keys.

After about forty-five minutes, appellant appeared at one of the doors of the main building with a white towel draped around his neck. He called to Peace to come get the keys from him, saying that he had something to take care of. The janitors then set up the chairs in the vocational building, taking thirty to sixty minutes. Appellant then arrived to check the work. It was a little after 11:00 a.m. Appellant told Acreman and Martinez that they could go home and that they would be paid for a full day's work. Peace was to give

appellant a ride home, so he walked back over to the main building with appellant, who checked to make sure the doors were locked.

Peace went with appellant while he checked the teacher's lounge and the cafeteria to be sure they were set up satisfactorily. Hearing some girls calling someone's name, they walked out into the hallway, and appellant asked the girls for whom they were looking. They described the victim, and appellant told Peace that they should look for her.

Peace noticed that an outside door near the auditorium and a door leading into the auditorium were open; appellant suggested they look inside the auditorium. Appellant told Peace to look in a loft above the stage where props were stored, and said he would look around the seats. Peace went up, looked halfheartedly, and came back down. Appellant asked Peace if he had "checked it out real good" and told him to go up and look again. Peace complied and moved a few things around but found nothing. The two then left the auditorium and looked in a few other places.

Appellant suggested they look in the auditorium again and, for the third time, he told Peace to go up to the loft area and look. This time, however, appellant accompanied Peace to the loft to help him look. Appellant told Peace once again to look "real good." When Peace picked up a piece of plywood leaning up against a door to the roof he saw the nude body of the victim on the floor. Peace screamed and called appellant, who told him to stay there and that he would get the police. Appellant left and returned with police officers.

Peace testified that the police searched his car and found a pistol, a paring knife, a zip-cut knife used

to cut bandages, and a wooden club that some students had made for him. He testified that he had lied at the first trial when he had stated that he had shown David Harris a picture of his pistol and that in fact he had shown Harris the gun itself. He also testified that he had a card with his picture that indicated that he was a narcotics officer. Peace said that he had had a bunch of cards made up at a flea market and that he used them in a play world which he had set up at home to play with his nieces and nephews.

Additional evidence adduced at trial included testimony that in May of 1980 drama students at Conroe High School had tied a white towel to one of the ropes of a pulley system in the loft of the auditorium. Acreman testified that after the janitors had waited at the vocational building for forty-five minutes, appellant had appeared at the doors of the main building with a white towel draped around his neck. Testimony established that on August 23, 1980 the white towel was not in the loft.

Danny Taylor, a high school student who worked during the summer as a janitor, testified that he, appellant, and a few other people were standing near the teachers' lounge one day early in the summer, when a group of female students walked by them. Taylor said that appellant remarked that "if he got one of them alone, ain't no telling what he might do."

Appellant called several witnesses to show that many others had master keys that would open the auditorium doors and that the doors near the stage leading outside had at times been propped open with a two-by-four. An expert called by appellant testified that he examined the various hairs submitted for comparison, and that he did not find any that matched hair taken from Henry Peace; he did find hairs similar

enough to appellant so that appellant could not be excluded. Appellant did not testify.

Hartwell Brown, the assistant principal at Conroe High School, testified that he was in charge of the auditorium, scheduling events and renting it to groups. The day before the murder, the auditorium had been set up for an in-service teachers meeting scheduled for Monday, August 25. After the preparations were finished, Brown personally checked all the doors in the auditorium except the one leading from the roof to the loft. He locked any door that was not locked, including a door leading to the outside which had to be slammed shut in order to lock. All the doors were locked when he left at 2:30 p.m. on Friday, August 22.

Doctor Joseph Jachimczyk, Chief Medical Examiner for Harris county, testified that the victim had been raped and strangled. He tested for and found seminal fluid in and around the vaginal area. There was a depression in her neck area 1-1/4 inches wide, which Jachimczyk testified was consistent with the use of a strap, belt, or towel of that width to strangle the victim. Appellant's belt was introduced into evidence; it measured 1-1/4 inches wide. Jachimczyk testified that urine accumulates at the rate of one ounce every fifteen minutes. The victim's bladder was empty, indicating that urine had just been eliminated.

Officer Kremenak, a member of the Conroe Police Department, testified that on August 25 he searched the dumpsters located behind the Conroe High School buildings and found a yellow plastic garbage bag similar to those used in the trash cans in the school. The bag contained the victim's shoes, belt, panties, shirt, jeans, and part of her bra. A string similar to a strand of mop string was found in the blue jeans.

Tony Arnold, a chemist-toxicologist from the Department of Public Safety laboratory in Austin, testified that he was experienced in the identification and analysis of hairs and fibers. He testified that he could exclude as "donor" persons whose hair did not match the characteristics of the sample to which he was comparing.

Various hairs were found on the victim and her clothing. Some were similar to appellant's, some not so similar. The evidence with regard to hair samples is inconclusive.

The standard for reviewing the sufficiency of the evidence on appeal is the same for direct and circumstantial evidence. *Carlsen v. State*, 654 S.W.2d 444 (Tex. Cr. App. 1983). That standard is whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Carlsen*, supra at 449. The evidence must be viewed in the light most favorable to the verdict. However, in the first trial of this case the jury did not reach a verdict; therefore we will examine all the evidence to determine whether the evidence would be sufficient to support a verdict of guilty. We apply this standard by determining whether the evidence supports an inference other than the guilt of the appellant. *Carlsen*, supra.

"[I]n a circumstantial evidence case the State is not required to prove to a moral certainty that the circumstances presented actually exclude *every* hypothesis that the criminal act may have been committed by another person; it must only exclude every *reasonable* hypothesis raised by the evidence that would tend to exculpate the accused. . . . it is enough that the conclusion of guilt is warranted by the combined and cumulative force of all the incriminating circumstances." *Vargas v. State*, 669 S.W.2d 741 (1984). If the evidence

presents such a reasonable hypothesis and the State does not disprove it, then the accused has not been proved guilty beyond a reasonable doubt. *Carlsen*, supra.

Appellant was the only janitor whose time was unaccounted for during the critical period when the victim disappeared, and the victim was last seen near in time and in place to where appellant began his solo labor. Appellant's belt matched the strangulation marks on the victim. Appellant was aware of the victim's presence. Appellant was the only one of five janitors with keys to the auditorium, although there was testimony that Peace at one time had a master key that would open the auditorium. There is no evidence that anyone else who had keys and access to the auditorium was even at the school on the morning of the murder. The doors to the auditorium were unlocked when appellant and Peace looked inside, and the victim's body was found in the loft in the auditorium. The microscopic examination of hairs found on the victim's body and clothes were found in a yellow plastic garbage bag like those to which appellant had easy access. A mop string was found in the victim's jeans; mops were kept in the janitors' closets, one of which was near the restroom that the victim was seen entering.

No reasonable hypothesis is presented by the evidence to even *suggest* that someone other than appellant committed the offense. The evidence is sufficient to sustain the guilt of appellant. The ground of error is overruled.

Appellant contends that veniremember Matchett was improperly excused for cause in violation of both the Sixth and Fourteenth Amendments to the United States Constitution and of *Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968). The

record contains a rather confusing discussion between Matchett and the attorneys concerning the procedure at the punishment stage of trial. Matchett initially expressed her opposition to the death penalty. The prosecutor explained the punishment phase of a capital murder trial and Matchett, while equivocating somewhat, stated that she had a very strong opinion against the death penalty and said there were no facts under which she would answer the first two punishment questions "yes" because it would result in the assessment of the death penalty. Defense counsel then re-explained the procedure at the punishment phase, stressing that the judge, and not the jury, assesses the death penalty if the jury answers the punishment questions "yes." Matchett then said that in a proper case she thought that she could follow the law and answer the two questions "yes." She added that she would not want to be the one "that would do something," apparently meaning impose the death penalty.

The prosecutor once again questioned Matchett and the source of her confusion became evident:

> PROSECUTOR: The law says if the jury answers both of them "yes", he [judge] must assess the death penalty. He's got no choice at all. Do you understand that?
>
> MATCHETT: No, I thought he [defense counsel] said that if you answered both of those "yes" that it would be left up to the Judge.

The prosecutor again explained the punishment procedures including the fact that the judge *must* assess death if the jury answers "yes" to the special issues.

The prosecutor continued questioning Matchett:

Q. Okay. Imagine you are on a jury, where the death penalty might apply. You find the defendant guilty. Then you go to the punishment stage where you answer these two questions and the law says two "yes" answers cause the Judge to give the death penalty, would you always have to answer one of those questions "no" to keep him from getting the death penalty?

A. Well, I guess I'd say "yes". I'd have to, because I don't believe in death penalty. Is that what you want me to answer?

Q. If that's the way your feel.

A. That's how I feel.

Q. That's how you feel?

A. Yes, it is.

Q. And are you against the death penalty in every case?

A. Yes.

Q. Could you ever vote to give a person the death penalty?

A. No.

Q. So, could you ever, no matter what

the evidence was, could you ever answer "yes" to both questions, which would amount to giving him the death penalty?

A. No.

Q. You could never, never answer "yes" to both questions?

A. Never. I could punish people in other ways, but never the death penalty.

Q. All right. So, if you took that oath to reach a true verdict according to the evidence, you'd have a real problem with that oath and with your feeling against the death penalty, wouldn't you?

A. Yes, I sure would.

. . . . .

Q. And you realize that two "yes" answers mean the death penalty. That's what the law says. You recognize that two "yes" answers--

A. Means the death penalty.

Q. Means the death penalty.

A. No, I wouldn't answer it then.

Q. You wouldn't ever answer--

A. I'd say "no."

Q. You'd say "no" every time?

A. Uh-huh.

Q. No matter what the evidence?

A. Yes, since you made it clear, I would.

Q. Okay.

A. Because I'd know what they were talking about.

We look to the record as a whole in reviewing a ruling on a challenge to a veniremember. Once Matchett understood the procedure at the punishment phase it was unequivocal that she could not and would not answer "yes" to the special issues in any case.

In *Adams v. Texas*, 448 U.S. 38, 100 S.Ct. 2521, 65 L.Ed.2d 581 (1980) the United States Supreme Court examined the applicability of *Witherspoon*, supra, to the Texas statutory death penalty scheme and stated:

> If the juror is to obey his oath and follow the law of Texas, he must be willing not only to accept that in certain circumstances death is an acceptable penalty but also to answer the statutory questions without conscious distortion or bias. The State does not violate the Witherspoon doctrine when it excludes jurors who are unable or unwilling to address the penalty questions with this degree of impartiality.

448 U.S. at 46, 100 S.Ct. at 2526. See also *Wainwright*

v. Witt, ___ U.S. ___, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985).

The trial court properly sustained the State's challenge for cause. The ground of error is overruled.

Appellant contends that the trial court erred in permitting Danny Taylor's testimony about appellant's remark, concerning high school girls, that "if he got one of them alone, ain't no telling what he might do."

Pursuant to appellant's motion in limine the prosecutors and defense attorneys conferred with the court in chambers regarding the admissibility of Taylor's testimony. The State informed the court what the testimony would be and stated that they offered it because it went to show motive and the propensity of appellant in this circumstantial evidence case. Appellant objected on the grounds that the evidence was irrelevant, immaterial and prejudicial. The court ruled that the testimony was admissible. Appellant objected again during the trial when Taylor testified.

The State argues that this statement was properly admitted because it was not an extraneous offense and it tended to show appellant's intent and motive, both of which were relevant. Initially we note that the extraneous matter need not constitute an *offense* in order to fall under the extraneous transaction rule. The established rule in this area applies to extraneous transactions which include but are not limited to acts which are offenses. See *Sanders v. State*, 604 S.W.2d 108 (Tex. Cr. App. 1980).

In *Williams v. State*, 662 S.W.2d 344 (Tex. Cr. App. 1983) this Court clarified the test for the admissibility of extraneous transactions. The two step test requires a "'showing by the prosecution both that

the transaction is *relevant* to a *material* issue in the case; and, the relevancy value of the evidence outweighs its inflammatory or prejudicial potential.'" 662 S.W.2d at 346. (emphasis in original). Further, we stated that "[i]n a circumstantial evidence case, admissibility as part of the state's direct evidence depends on the transaction's relevance to a material issue which the state must prove." 662 S.W.2d at 346.

The State contends that Taylor's testimony concerning appellant's comment tends to show his intent, which was a material issue. The State also argues that the remark shows appellant's motive, which goes to the material issue of identity. We must determine whether the statement tends to prove that appellant caused the death of the victim or that, if he did, it was in the course of the alleged accompanying crime.

Extraneous transactions must be analyzed for relevance within the context of the facts and circumstances of the individual case. Evidence offered to show motive is admissible because it is evidence that can aid in proving that an accused committed the alleged offense. However, the proffered evidence "must fairly tend to raise an inference in favor of the existence of a motive on the part of the accused to commit the alleged offense." *Porter v. State*, 623 S.W.2d 374, 386 (Tex. Cr. App. 1981); *Foy v. State*, 593 S.W.2d 707, 708 (Tex. Cr. App. 1980).

In *Foy*, supra, we held that prior extraneous misconduct committed against the victim of the offense charged was admissible to show motive for committing the offense charged. In *Foy*, specific transactions, directed against a specific person, the victim, were held admissible. In *Russell v. State*, 598 S.W.2d 238 (Tex. Cr. App. 1980) numerous cases are set out concerning the admissibility of extraneous evidence regarding

motive. In *Hughes v. State*, 563 S.W.2d 581 (Tex. Cr. App. 1978) the defendant was tried for the capital murder of a police officer who had attempted to approach him. Evidence of a prior probated conviction was admissible as bearing upon the defendant's motive in avoiding apprehension by the police officer. See also *Porter*, supra. From these cases we see that extraneous transactions directed specifically toward a certain individual person as in *Foy*, supra, and extraneous transactions that create in the actor an animus toward or fear of a class of persons, as in *Hughes*, supra, can be relevant and admissible to show motive.

Appellant contends that Taylor's testimony about "a casual remark made to several co-workers about passing girls" cannot be construed as showing motive, is not relevant to anything in the case, and is prejudicial. But, the victim was a stranger to appellant, apparently never having encountered him previously. In this context, appellant's general statement to his co-workers about what he might do to female students if her ever "got one of them alone" takes on greater probative value.

Further, appellant's defensive theory was that Henry Peace had committed the offense. Through vigorous cross-examination of Peace and several other witnesses, appellant attempted to suggest that Peace was the perpetrator of the offense. Appellant's comment thus tends to link appellant rather than Peace to the crime by suggesting a motive for the seemingly random rape-murder, and demonstrates appellant's motive by showing his attitude toward a particular group of people--female high school students. The comment, when examined in the context of the seeming randomness of the rape and murder, is relevant as tending to show that appellant, and not Peace, took an unusually strong interest in persons like the victim.

The question then follows--does the probative value of the evidence outweigh its potential prejudicial effect? This is a close question; however, given the probative value of the comment in linking appellant to the offense, given the fact that the State relied entirely on circumstantial evidence, and given the relatively minor role of the testimony in comparison to the other voluminous testimony, we find that it does. To the extent that the comment can be classified as "locker room talk"--something almost any man or boy might have said--it is of little moment in prejudicing appellant as well as in proving his guilt. It is probative in helping to explain an otherwise seemingly random event and giving what strength it can lend to the other circumstances implicating appellant, at the same time serving as a rejoinder to appellant's attempt to paint Peace as the villain by showing that, although Peace may have his unusual attributes, the *relevant* preoccupation is that of appellant. The court properly admitted the evidence. The ground of error is overruled.

Appellant contends that the court erred in excluding from evidence certain items found by police during a search of Henry Peace's car.

Peace testified that he consented to a search of his car by police on August 23. He stated that he had the following items in his car: a gun, a wooden club, a paring knife, and a knife used to cut bandages off. Peace also testified that he carried a laminated card that indicated that he was a narcotics officer. The court ruled that appellant could not introduce the gun, the club, or a set of handcuffs that were also found in the car, into evidence, or exhibit them in the presence of the jury. Testimony was admitted as to all but the handcuffs.

Appellant's defensive theory was that Peace had

murdered the victim. Appellant argues that an accused should be allowed wide latitude in establishing reasonable hypotheses in a circumstantial evidence case and that he should have been permitted to exhibit the excluded items before the jury. Testimony established exactly what was found in Peace's car, except for the handcuffs. The error, if any, is harmless at best.

Appellant also contends that the court "erred in holding evidentiary hearings in chambers during the trial of the case, thereby denying Appellant a public trial." The trial objection and appellant's brief are addressed, not to the holding of the hearings in chambers, but rather to the refusal of the trial court to allow appellant to make a bill of exception in the courtroom out of the presence of the jury. Appellant's specific complaint is that the court denied his request to make a bill of exceptions in the courtroom. We will address only the specific complaint which was properly preserved for review.

The setting for the action of which appellant now complains is important. During the trial before the jury, appellant objected to a question by the prosecutor pertaining to the probable cause for appellant's arrest. The court and attorneys discussed the matter in chambers. After a lunch break, the discussion resumed at the bench. The court overruled appellant's motion for mistrial which was based upon the prosecutor's question. Defense counsel then said, "I want to do our bill in Open Court." [sic][1] The Court denied the request.[2]

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[1]It appears that appellant meant in the courtroom outside the presence of the jury by his use of the term "Open Court."

[2]This bill apparently pertained to a previous ruling of the court regarding the admissibility of certain exhibits. Earlier in the day, the court had told defense counsel to wait and make the bill of exceptions at noon time.

The court overruled his objection regarding the bill of exceptions and the bill was made in chambers.

"The purpose of a bill of exceptions is to have the record disclose some event or occurrence at the trial or other proceedings which reflects error, Articles 40.09, subd. 6(a); 36.20, Vernon's Ann.C.C.P., ..." *McCall v. State*, 512 S.W.2d 334 (Tex. Cr. App. 1974). The bills are done for appellate purposes, not for trial purposes. A bill of exceptions is evidence that is included in the record for appellate purposes only and is not shown to the jury. The trial court has already ruled on the admissibility of the evidence which is the object of the bill. The bill of exception is made to perfect the record and preserve the alleged error.

The concerns addressed by both this Court and the United States Supreme Court in regard to a defendant's right to a public trial and the public's right of access to trial do not apply to a bill of exceptions. See *Houston Chronicle Pub. Co. v. Shaver*, 630 S.W.2d 927 (Tex. Cr. App. 1982); *Gannett v. DePasquale*, 443 U.S. 368, 99 S.Ct. 2898, 61 L.Ed.2d 608 (1979); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 100 S.Ct. 2814, 65 L.Ed.2d 973 (1980); *Waller v. Georgia*, ___ U.S. ___, 104 S.Ct. 2210, 81 L.Ed.2d 31 (1984). "The requirement of a public trial is for the benefit of the accused; that the public may see he is fairly dealt with and not unjustly condemned, ..." *Gannett*, supra, 443 U.S. at 380, 99 S.Ct. at 2905, (Quoting 1 Cooley, Constitutional Limitations 647 (8th ed. 1927). A public trial not only ensures that the judge and prosecutor act responsibly, but it also encourages witnesses to come forward and discourages perjury. *Waller*, ___ U.S. at ___, 104 S.Ct. at 2215. These concerns are not in any effectuated or promoted by the making of a bill of exception in the courtroom, out of the presence of the jury, about a matter upon which a judge has already

ruled. In contrast to a bill of exception, compare a hearing on the admissibility of a confession or the admissibility of evidence. The court hears evidence before ruling on the issue. The hearing has many attributes of a trial and the concerns and policies that underlie a public trial are also present in such hearings.

Further, under Art. 40.09, subd. 6 and Art. 36.20, V.A.C.C.P. a bill of exceptions, in the discretion of the trial court, may be presented in writing, may be in narrative form, or may be made after trial. The methods approved for making a bill of exceptions, and the purpose served by the bill itself, operate against the conclusion that a bill should be designated part of the proceedings of a public trial.

We hold that ordering a bill of exceptions to be offered in chambers does not violate appellant's right to a public trial under Art. 1, Sec. 10 of the Texas Constitution, the Sixth Amendment to the United States Constitution, or Art. 1.24, V.A.C.C.P.[3] The record before us--a public record--includes the evidence offered in appellant's bill. The ground of error is overruled.

Appellant contends that the court erred in overruling his motions for mistrial when the State asked Officer Koerner whether he had any knowledge of the previous history of appellant that might have a bearing upon the instant case in regard to probable cause for charging appellant with the offense.

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[3]We note that if refusal to allow a bill of exception to be made in the courtroom constitutes a violation of a defendant's right to public trial under either Texas law or the United States constitution the remedy would be to remand the case and allow the bill to be made in the courtroom. See *Waller*, supra. We see no reason such a nunc pro tunc ceremony could not be performed; neither do we see any utility in its performance.

Defense counsel cross-examined Officer Koerner about the evidence and information that had been gathered as a basis for filing charges against appellant. After questioning him in some detail about the specific information known before the filing of the complaint defense counsel asked:

> Q. Did anybody put any pressure on you to get somebody in jail, because school was fixing to start?
>
> A. No, sir. I had no political pressure.
>
> Q. Did you have any more evidence on Friday, when the complaint was filed against this Defendant than you had on Monday? To your knowledge.
>
> A. Repeat your question.
>
> Q. Did you have any more knowledge about this crime on Friday, when you filed a complaint against this Defendant than you had the preceding Monday?
>
> A. No, sir.

The State then sought to clarify Koerner's testimony:

> Q. Now, you were asked about what information that you had as of Friday that you might have presented to the District Attorney with regard to probable cause for filing these charges in the complaint against this defendant. Now, listen to the question carefully and answer "yes" or "no". On Friday, the 29th of--as of

> Friday, August 29th, 1980, other than the facts that you had learned of this case at that time, about what happened at the high school, did you have knowledge of a previous history of this defendant that might have a bearing upon what happened--
> BY MR. BROWN [defense counsel]: Objection, Your Honor.
> BY THE COURT: Sustained.
> BY MR. KEESHAN [prosecutor]: May we approach the bench, Your Honor.
> BY THE COURT: Sustained, and ladies and gentlemen, you're to disregard, any of these questions or any responses at this point.

After much discussion out of the presence of the jury, defense counsel moved for mistrial contending that the court's instruction would not cure the error that had been committed by the asking of the question. The court overruled the motion.

Appellant also moved for mistrial on the ground that the asking of the question was prosecutorial misconduct because it was a violation of the court's instruction on appellant's motion in limine. The court also overruled this motion.

After much discussion in chambers the court permitted the prosecutor to ask the question in somewhat different words:

> THE PROSECUTOR: I'm going to ask you this last question, and I want you [to] answer it just "yes" or "no". Aside from what Mr. Morris has questioned you about,

those matters, and aside from this DPS information upon the hairs you've just mentioned, did you have other information which formed part of the basis for filing of the complaint with Mr. Keeshan?

THE WITNESS: Yes, sir.

Appellant again moved for mistrial claiming that the question asked compounded the harm from the original question. The court overruled appellant's motion.

Appellant raised the probable cause issue first and questioned Officer Koerner about the details of the basis for filing a complaint against appellant. Appellant sought to show that the State had very little evidence on which they based the complaint. Following this questioning it was permissible for the State to clarify and explain the probable cause issue further. Appellant "opened the door" on the issue and under Art. 38.24, V.A.C.C.P. the State is permitted to complete the picture. See *Wintters v. State*, 616 S.W.2d 197 (Tex. Cr. App. 1981); *Parr v. State*, 557 S.W.2d 99 (Tex. Cr. App. 1977). In fact, the court limited the State's questioning perhaps even more than it could have. Indeed, no mention of prior offenses or prior arrests even appeared. The ground of error is overruled.

In six grounds of error, appellant contends that reversible error inhered in the prosecutor's arguments at the guilt-innocence stage and punishment stage of trial.

First, during argument at the guilt-innocence state of trials, the State, in discussing the testimony of Henry Peace when he discovered the victim's body said:

MR. WINFREE: Officer Naranjo may have asked, "Is she dead?", and Ickie trying to help went over and checked her pulse.

MR. BROWN: (OBJECTION) I'm going to object to that, Your Honor, there's no evidence that he said "Is she dead?" And he testified. I ask--

THE COURT: Objection is sustained.

MR. BROWN: We ask the Court to instruct the jury to disregard what he might have said.

THE COURT: Jury, disregard.

MR. WINFREE: (continuing) If it happened--when Naranjo had his turn, automatically would have said, "Is she dead?" Naranjo didn't touch her himself, remember that?

MR. BROWN: (OBJECTION) I'll object to that. He testified fully--he never testified--in fact, he denied ...

MR. KEESHAN: Your Honor, it's a logical deduction from the evidence that an officer might ...

THE COURT: Overruled.

Peace testified that one of the officers asked him to check the victim's pulse. The officers denied doing so. Whether the prosecutor's argument is a logical deduction made from this conflicting testimony, we need not decide because we do not perceive, nor does

appellant mention, any harm that possibly occurred due to this argument. The argument did not even concern appellant and in no way reflected harm or prejudice upon him. The ground of error is overruled.

Appellant alleges that the court erred in overruling his objection to another argument concerning Henry Peace made at the guilt-innocence stage. The prosecutor was discussing the fact that appellant sent Peace up to the loft three times to look for the missing girl:

> MR. KEESHAN: You know that he [Peace] must have told Mr. Collier how many times he'd been up there or these men wouldn't ...
>
> MR. BROWN: (OBJECTION) Your Honor, there's no evidence he told Mr. Collier how many times. Mr. Collier did not testify to any conversation.

The court overruled appellant's objection.

During the trial the prosecutor asked Mr. Collier: "Did he [Peace] have occasion to tell you how many times he had gone to look for the body?" Mr. Collier answered "Yes sir. He did." Appellant now contends that asking how many times he had been "up there" and how many times he had looked for the body are two separate and distinct questions and that the former comment, stated during argument, injects new evidence into the case. We disagree.

The reference in both questions, given the context within which they were asked, was to the number of times appellant had told Peace to look in the loft for the missing girl. The argument was not improper. The ground of error is overruled.

The next argument complained of, also made during the guilt-innocence stage, dealt with appellant's employment at a funeral home. During the trial, Texas Ranger Wesley Styles testified that he went to a funeral home which was one of appellant's places of employment. No other information was elicited about this employment. The prosecutor argued to the jury:

> MR. KEESHAN: An important part or piece of evidence that we haven't gone into much, another important part is the fact that this defendant worked at a funeral home. We have not gone into that very much but you know that Wesley Styles, the Texas Ranger, said he went by and verified his employment at the Collins and Johnson Funeral Home and Dr. Jachimczyk told you from the medical evidence that it appeared that this girl had been molested after she was dead or unconscious. We know also that the person who committed this offense had to have stayed with that body--
>
> MR. MORRIS: (OBJECTION) Your Honor, we are going to object to this. This is inflammatory--just because of a job check does not give him rise to make this type of an inflammatory argument.
>
> THE COURT: Overruled.
>
> MR. KEESHAN: (continuing) Thank you, Your Honor. We know that whoever did this was not repelled by a dead body. Somebody stayed there and took the clothing off that body; somebody had intercourse with that body apparently after she was unconscious or dead. It is not just everybody who

> is going to be involved in that kind of offense ... This man was not repelled by the fact that she was deceased. Furthermore, what else did we hear from Jim Schmidt? Jim Schmidt is the mortician from the Metcalf Funeral Home. He came by and was one of those persons who picked up [the victim's] body and he said--when you get a body with clothing on in the funeral home, one of the first things we do is take the clothing off and we put it where? In a bag. We put it in a bag. That's what happened in this case. Those are two more links in the chain. I submit that the person who did it was not repelled. And, also, following instinct or pattern or habit or whatever, the clothing was placed in a bag ....

The first part of the argument was based on testimony elicited during the trial. The argument was proper. In addition, it is not clear as to what appellant's objection was directed. Appellant seems to be objecting now to the inferences the State made in their argument from the fact that appellant worked at a funeral home. These inferences, made during the second part of the argument, that appellant was not repelled by death, were not objected to by appellant. The error, if any, in the second part of the argument was not preserved.

Appellant also alleges that the argument constituted prosecutorial misconduct because it was made in bad faith. Appellant claims that evidence adduced at a hearing on appellant's amended motion for new trial on the issue shows that the prosecutor had been told by the owner of the funeral home that appellant was an odd-jobs handyman and was not involved in disrobing bodies, etc. However, the owner also testified that appellant had expressed an interest in becoming a

mortician, was seen in the preparation room, had picked up and transported dead bodies, was frequently around dead bodies, and had never expressed any fear about being with dead bodies. The State argues that it would logically follow that one who was so employed was not repelled by dead bodies. Thus, their argument was proper and not made in bad faith. We agree that the argument was not made in bad faith in light of the testimony given at the hearing on the motion for new trial. It is a reasonable deduction that one who works at a funeral home and is constantly around dead bodies is not repulsed by them. Since appellant did not object to this argument we do not comment on its propriety. The ground of error is overruled.

Appellant's next three grounds deal with allegedly improper argument at the punishment phase. First, appellant contends that the State struck at appellant over the shoulder of defense counsel. Defense counsel argued:

> MR. BROWN: I would like to say this: that you and each of you took an oath on your God that you would a true verdict render in this case. And I'm telling you now that under the oath you took in this case, if you believe from the evidence that you've heard beyond a reasonable doubt and to a moral certainty, that there is no reasonable possibility that someone else could have committed this crime, you should assess the death penalty.
>
> MR. KEESHAN: You Honor, ...
>
> MR. BROWN: (continuing) And you know the other alternative, if your conscience

> bothers you at all because of your verdict. Thank you.
>
> THE COURT: You may proceed.
>
> MR. KEESHAN: Thank you your Honor. May it please the Court, ladies and gentlemen of the jury, it is not considered professional to attack the verdict of the jury or quarrel with the verdict ...
>
> MR. BROWN: I object your Honor, there was no attack on the verdict. I said if they believe it they should assess the death penalty. That was my argument.
>
> THE COURT: Okay. Over--Let's proceed.

The intent of defense counsel's argument seems to have been to shame the jury which had convicted appellant into negative answers to the punishment issues. He essentially encouraged jurors to be lenient at punishment if they had second thoughts *about the verdict of guilt.* The prosecutor's argument was a response to that attack on the verdict. No error is presented.

In addition, we note that from the record it appears as if the court started to rule on the objection but never did. Thus, appellant has not preserved anything for review.

Appellant contends that the following argument by the State at the punishment stage was improper:

> MR. KEESHAN: Another consideration in the punishment phase is rehabilitation. I know all of you have heard of that. That's a popular term. And a popular consideration

> in young first offenders. I think it's a matter of common knowledge that young first offenders are normally given a second chance when they violate the law unless it's some atrocious crime. And rehabilitation is often then a factor for you to consider at the punishment phase. But this defendant from the evidence has had his opportunity for rehabilitation.
>
> MR. BROWN: (OBJECTION) Your Honor, I object to his arguing about rehabilitation. It's not proper in this case. It's a life sentence or death penalty.
>
> THE COURT: Overruled.

The prosecutor continued his argument stating that appellant had already had his opportunity for rehabilitation and ended up killing someone.

Appellant argues that the remark is prejudicial because "it is a suggestion that, through parole, the Appellant might get out some day if given a life sentence." The State contends that they were "merely arguing for affirmative answers to the special issues." They also argue that rehabilitation could apply to a person who was sentenced to life imprisonment. The State's argument is that appellant had already had his chance at rehabilitation and obviously failed, therefore, death was an appropriate penalty for him.

We agree that the import of the prosecutor's argument was that appellant had been given his opportunity to reform and had then raped and murdered a high school girl. Parole was never mentioned nor can it be said that a jury would infer that the comment related to parole. It is permissible for

the prosecutor to argue that appellant had been previously convicted and yet had not been rehabilitated.[4] It is a reasonable deduction from the evidence. The argument was not improper. The ground of error is overruled.

Appellant's last contention involving punishment argument concerns the following:

> MR. KEESHAN: I think you can see from the evidence, from some of the photographs, there is a look of stark terror in the photographs seen on her face. It is fair for you to think about the feelings of the father who lost his baby daughter and it is fair for you to think about how you would feel if you lost your children in considering ...
>
> MR. BROWN: (OBJECTION) Your Honor, I object to his placing the jury in the shoes of the victim and the victim's family.

The court sustained appellant's objection, instructed the jury to disregard the statement, and overruled appellant's motion for mistrial.

Appellant contends that this was improper argument which inflamed the jury and thus prejudiced appellant. To be proper, argument must fall within one of the following four categories: (1) summation of the evidence; (2) reasonable deduction from the evidence; (3) answer to argument of opposing counsel; or, (4) plea for law enforcement. *Todd v. State*, 598 S.W.2d 286 (Tex. Cr. App. 1980). The argument complained of does not fit into any of the four categories; it is rather a plea for abandonment of objectivity. We must consider

---

[4]Appellant was not a first offender. At the time of the instant offense he was on probation for a weapons offense.

whether it constitutes reversible error, that is, whether in light of the record as a whole the argument is extreme or manifestly improper, it is violative of a mandatory statute, or it injects new facts, harmful to the accused, into the trial proceedings. *Goocher v. State*, 633 S.W.2d 860 (Tex. Cr. App. 1982); *Todd*, supra. Given the record as a whole and given the timely instruction to disregard, we find that the argument is not of the tenor to require reversal. Similar cases have found such argument to be harmless. See *Adell v. State*, 152 Tex.Cr.R. 152, 211 S.W.2d 575 (1948); *Patillo v. State*, 131 Tex.Cr.R. 393, 98 S.W.2d 825 (1937); *Liel v. State*, 129 Tex.Cr.R. 99, 83 S.W.2d 680 (1935). The ground of error is overruled.

Appellant next contends that he requested that the appellate record contain certain original exhibits and that the record instead contains copies of some of those exhibits, which were photographs, and a description in place of one of the exhibits, which was a plastic identification card belonging to Henry Peace. Appellant claims that the exhibits pertained to his defensive theory and that the original photographs and identification card are vital to show that theory. In some cases it will be important, even critical, that the original exhibits be included, and a copy will not suffice. In this case we have carefully reviewed the record including the exhibits and the description of the identification card. The copies in the record are adequate for the purposes of our review. No error is presented. See Art. 40.09, subd. 1. and Art. 44.11, V.A.C.C.P.

Finally, appellant contends that the court erred in refusing to allow appellant to recall Henry Peace for further cross-examination. The sequence of events leading up to the court's refusal must be set out in order to understand the context of the refusal. Appellant cross-examined Peace extensively. Officer

Styles then testified as a State's witness. He testified that he interviewed Peace. It is apparent from appellant's cross-examination of Styles that he was aware that Styles taped his interview with Peace. It is also apparent from the cross-examination that appellant had a copy of Styles' offense report which contained Styles' transcription of the interview. Sometime later, after another witness had testified, appellant's counsel stated that "through Wesley Styles, a state witness, it was revealed for the first time that Mr. Peace made a statement to Wesley Styles ... at the police station ... in which he made certain statements about finding the body of [the victim], contrary to the way he testified in this case." Appellant's counsel stated for the record that he wanted to call Peace back for further cross-examination and that "[w]e object to the ruling of the Court in this regard." Up to this point the record does not contain any ruling by the court concerning this issue. There was further discussion concerning Peace's statement to Styles and the court then stated that Styles's report was not a statement because it was neither signed nor read by Peace, and was part of Styles' investigative work-product. Nothing further was offered by appellant pertaining to the statement. Appellant did not make a bill of exceptions showing the content of the statement or that it was exculpatory, as he now claims, neither did he in any way show that the "statement" was indeed a statement and not investigative work product.

The court's ruling that the statement itself was not admissible was proper. Appellant should have been permitted to recall Peace for the purpose of impeaching him and to ask him if he had made the particular "statement." If Peace admitted making the statement the impeachment would be complete. If Peace denied making the statement appellant could call Styles and ask him if Peace had made the statement.

However, since the record contains neither a ruling forbidding the recall of Peace nor a bill of exceptions showing what the cross-examination would reveal or the content of the statement was, no error is presented. See *Craig v. State*, 594 S.W.2d 91 (Tex. Cr. App. 1980). The ground of error is overruled.

The judgment is affirmed.

CLINTON and TEAGUE, JJ., dissent.

APPENDIX E

EX PARTE CLARENCE LEE BRANDLEY

Habeas Corpus Application

WRIT NO. 9691-02 - - - from MONTGOMERY County

ORDER

This is an application for a writ of habeas corpus filed in this Court pursuant to the provisions of Article 11.07, V.A.C.C.P. Applicant was convicted of the offense of capital murder with punishment being assessed at death. On direct appeal his conviction was affirmed. *Brandley v. State*, 691 S.W.2d 699 (Tex. Cr.App. 1985). In this application the applicant contends that there is newly discovered evidence, that the State purposely excluded all blacks from the petit jury, that the State withheld favorable evidence, that there was jury misconduct and that three jurors were improperly excused. The trial court conducted an evidentiary hearing on the allegations made in the application and an additional allegation made by oral amendment to the writ. He then made findings of fact and conclusions of law ultimately concluding that none of the grounds have merit. After a review of the record developed herein we agree with the trial court. Accordingly, the application for writ of habeas corpus is hereby denied.

IT IS SO ORDERED THIS THE 22ND DAY OF DECEMBER, 1986.

PER CURIAM

En banc
T. Davis and McCormick, JJ., not participating.
Teague, J. would file and set on allegation numbers 1, 2, 3, and 5.

Supreme Court, U.S.
FILED
AUG 13 1990
JOSEPH F. SPANIOL, JR.
CLERK

NO. 89-1887

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

THE STATE OF TEXAS,
Petitioner

v.

CLARENCE LEE BRANDLEY,
Respondent

On Petition for Writ of Certiorari To the Texas Court of Criminal Appeals

BRIEF IN OPPOSITION TO STATE'S PETITION FOR WRIT OF CERTIORARI

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To The Honorable Justices Of The Supreme Court:

NOW COMES CLARENCE LEE BRANDLEY, Respondent, by and through his counsel of record, Mike DeGeurin, and files this Brief in Opposition to State's Petition for Writ of Certiorari and in support thereof would respectfully show this Honorable Court as follows:[1]

STATEMENT OF THE CASE

In 1981, Clarence Brandley was convicted of capital murder and sentenced to death in Conroe, Montgomery County, Texas. The Texas Court of Criminal Appeals

1. For purposes of this Brief in Opposition, the Respondent will be referred to as "Clarence Brandley" or "Brandley." The Petitioner will be referred to as "Montgomery County".

affirmed Brandley's conviction on direct appeal in 1985. *Brandley v. State,* 691 S.W.2d 699 (Tex. Crim. App. 1985). (The opinion has been included in Montgomery County's Petition for Writ of Certiorari as Appendix D.)

Beginning in 1986, substantial new evidence surfaced indicating that another individual, not Clarence Brandley, committed the murder for which Clarence Brandley had been awaiting execution on Texas' death row. Based in part on the new evidence supporting Brandley's innocence, a Second Application for Writ of Habeas Corpus was filed on March 20, 1987, six days before Brandley was scheduled to die by lethal injection. (The Second Application for Writ of Habeas Corpus is included in the Appendix for Respondent as Exhibit A.)

Over the objections of the Montgomery County District Attorney, the trial court granted a stay of execution so that Brandley's claims could be reviewed prior to his death. The Texas Court of Criminal Appeals thereafter entered an order directing the trial court to conduct an evidentiary hearing on each issue raised in Brandley's writ application. (The order is included in the Appendix for Respondent as Exhibit B.) The order further directed the trial court to make findings of fact as to each issue, including Clarence Brandley's claim that he is innocent.

Pursuant to the order of the Texas Court of Criminal Appeals, the trial court heard testimony from 46 witnesses, in addition to extensive video and audio tape evidence, in a 10 day hearing totaling 10 volumes and over 1700 pages in the record, exclusive of exhibits. Also pursuant to the order of the Texas Court of Criminal Appeals, the trial court then filed findings of fact and conclusions of law totaling 47 pages, as to each claim raised by Brandley. (The trial court's findings of fact and conclusions of law, entitled "Order", are included

in the Appendix for Respondent as Exhibit C.) In its findings of fact, the trial court recommended that the Court of Criminal Appeals set aside Brandley's capital murder conviction. Specifically, the trial court found that Clarence Brandley is innocent of the crime for which he was convicted and that Montgomery County obtained Brandley's conviction through the use of witness intimidation, perjured testimony, suppression of exculpatory evidence, and an investigation which was conducted not to solve the crime, but to convict Brandley.[2] The trial court additionally found that Brandley, who is black, was the victim of racial discrimination in Conroe, Montgomery County, Texas, which impermissibly infected the fairness of the proceedings against Brandley.

After receiving the findings of fact from the trial court, the Court of Criminal Appeals ordered that briefs be filed and then conducted oral argument. The Court thereafter issued its opinion on December 13, 1989, setting aside Brandley's conviction. The Texas Court of Criminal Appeals specifically recognized in its opinion "the overwhelming evidence supporting the trial court's findings."[3] *Ex Parte Brandley,* 781 S.W.2d 886, 888 n.1. (Tex. Crim. App. 1989). (The opinion is included in Montgomery County's Petition for Writ of Certiorari as Appendix A.)

Clarence Brandley was released from custody on January 23, 1990, after spending nine years on Texas' death

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2. Regarding Brandley's first claim for relief, that the application of the death penalty constitutes cruel and unusual punishment because he is innocent, the trial court found "that credible and probative new evidence exists which establishes, by a preponderance of the evidence, that Petitioner is innocent of the crime for which he is now under the sentence of death." Appendix for Respondent, Exhibit C, at 2.

3. This Court should accord the trial court's findings of fact the presumption of correctness. Congress intends deference by federal courts to factual determinations of all State courts. *Sumner v. Mata,* 449 U.S. 539, 547, 101 S.Ct. 764, 769, 66 L.Ed.2d 722 (1981); *cf.* 28 U.S.C. 2254(d).

row. Brandley's efforts for a new trial, wherein he can present the evidence Montgomery County had previously suppressed, the new evidence that another person committed the crime, and the recantations of several key prosecution witnesses, are on hold pending resolution of Montgomery County's Petition for Writ of Certiorari.

I.

THE "STATEMENT OF FACTS" AS SET FORTH IN MONTGOMERY COUNTY'S PETITION FOR WRIT OF CERTIORARI IS INCOMPLETE, INACCURATE AND MISLEADING

The "Statement of Facts" section of Montgomery County's Petition for Writ of Certiorari wholly ignores the trial court's findings of fact and the 1700 pages of testimony adduced at the 1987 post conviction evidentiary hearing.[4] Montgomery County disregards the findings of fact and the evidence from the extensive post conviction hearing despite the fact that the opinion of the Texas Court of Criminal Appeals, of which Montgomery County now complains, is based on the trial court's findings of fact from the hearing. Because Montgomery County's "Statement of Facts" ignores the trial court's findings of fact and the due process issues which surfaced after the Texas Court of Criminal Appeals affirmed Brandley's conviction in 1985, the recitation is incomplete, inaccurate, misleading and couched in an apparent attempt to make the 1989 opinion of the Texas Court of Criminal Appeals appear less well reasoned than if Montgomery County had properly revealed all the facts to this Court.

A. STATEMENT OF FACTS

Clarence Brandley's capital conviction was based entirely on circumstantial evidence: there were no eye witnesses and no scientific evidence of any significant proba-

4. Montgomery County even fails to include the trial court's order in its Appendix and Appendices.

tive value. Appendix for Respondent, Exhibit C, at 30. The victim, 16 year old Cheryl Fergeson, was the manager of a girl's high school volleyball team which had traveled to Conroe High School for a scrimmage. *Brandley v. State,* 691 S.W.2d at 701. The primary evidence against Brandley, a janitor at Conroe High School, was the circumstantial testimonial evidence of the other janitors who were present at the school when Cheryl Ferguson was raped and murdered sometime after she left the gym area alone. Appendix for Respondent, Exhibit C, at 30.

The murder occurred at Conroe High School on Saturday, August 23, 1980. *Id.* Classes for the fall term were scheduled to commence in a week. *Id.* The local authorities had announced to a frightened public that they would have a suspect arrested prior to the start of classes. *Id.* The district attorney requested the assistance of Texas Ranger Wesley Styles to head the investigation. *Id.* Styles began his investigation the evening of August 28, 1980, and arrested Clarence Brandley the next day, the Friday before school was scheduled to start. *Id.* at 30-31.

The day after Brandley's arrest, Styles arranged for three of the janitors, Gary Acreman, Sam Martinez and John Sessum, to meet at the high school. *Id.* at 31. Rather than interview each janitor separately, Styles instead conducted a "walk through" wherein the janitors were walked as a group through the sequence of events on the day of the murder, and were questioned in each others presence. *Id.* Of the janitors present, Gary Acreman did most of the talking at the walk through. *Id.*

The consistent testimony of the other janitors was the critical circumstantial evidence against Brandley. *Id.* at 34. The testimony placed Brandley proceeding up the hallway, climbing the stairs to the landing, and then approaching the area of the restrooms and the janitor's closet with rolls of toilet paper in his hands a few minutes

after the victim had taken the same route and entered the ladies restroom. *Brandley v. State,* 691 S.W.2d at 701. The janitor's testimony additionally established that the janitors left the area together, after Brandley had followed the same course which the victim had taken to the area of the restrooms and the janitor's closet, and remained together as a group at another building for approximately the next 45 minutes. *Id.* at 702. The consistent testimony of the janitors therefore served a two fold purpose for the State at trial: the testimony isolated Brandley in an area alone with the victim and additionally kept the remaining janitors together as a group in a location removed from the victim, so that each janitor had an alibi, thereby destroying any reasonable alternative hypothesis that a janitor other than Brandley may have committed the offense. *See Id.* at 702, 704.

Brandley's first trial ended in a mistrial when the jury was unable to reach a verdict. *Id.* at 701. Upon re-trial, the jury convicted Brandley and sentenced him to death. *Id.* On direct appeal, the Texas Court of Criminal Appeals affirmed Brandley's conviction, holding *inter alia,* that the evidence was sufficient because there was no reasonable hypothesis other than Brandley's guilt, based in part upon the fact that the whereabouts of the other janitors was accounted for at the time of the murder.[5] *Id.* at 704, 713.

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5. The court noted that all of the other janitors remained together at another building while Brandley remained alone:

> "The three janitors left. They met Peace as he was coming out of the teacher's lounge, and all four walked across the street to the vocational building. The building was locked; they waited for appellant, who had the keys." *Brandley v. State,* 691 S.W.2d at 702.
>
> . . .
>
> "Appellant was the only janitor whose time was unaccounted for during the critical period when the victim disappeared, and the victim was last seen near in time and in place to where appellant began his solo labor." *Id.* at 704.

Subsequent to affirming Brandley's conviction on direct appeal, the Court of Criminal Appeals entered an order requiring the trial court to conduct an evidentiary hearing regarding the legality of Brandley's conviction. Appendix for Respondent, Exhibit B. The evidence at the hearing revealed, among other things, the falsity of the janitors' consistent testimony at trial. Upon considering those matters which the court did not have the benefit of when reviewing Brandley's case on direct appeal—the trial court's findings of fact based on the evidence presented at the post conviction hearings—the Court of Criminal Appeals set aside the same conviction which they had previously affirmed in 1985. Whereas the Petition for Writ of Certiorari filed by Montgomery County refers only to those facts which the Court of Criminal Appeals considered on direct appeal back in 1985, yet ignores the trial court's post conviction findings of fact which the Court of Criminal Appeals relied upon to set aside Brandley's conviction, the following statement of facts includes the trial court's findings of fact from the evidentiary hearing which the Court of Criminal Appeals found to be supported by "overwhelming evidence". *Ex Parte Brandley,* 781 S.W.2d at 888 n.1.

Janitor John Sessum admitted at the evidentiary hearing that he had lied both in his written pretrial statements and also during his testimony at Brandley's first trial. Appendix for Respondent, Exhibit C, at 33. Sessum lied by going along with Acreman's story that Brandley had followed the victim to the area of the restrooms while all the other janitors left the scene together and remained together for approximately the next 45 minutes at another building. *Id.* Sessum revealed at the post conviction hearing how he and fellow janitors Gary Acreman and Sam Martinez were waiting at the bottom of the hallway steps, prior to the arrival of Brandley, when the victim walked

up the hallway from the direction of the gym. *Id.* at 3. Acreman commented that the victim was "good looking", then told her where the restroom was, and then followed the victim up the stairway, talking to her at the top of the landing.[6] *Id.* at 3, 33.

While Acreman was talking with the victim at the top of the stairs, the girl said "No, No," a couple of times and "Don't" and "Help". *Id.* at 3. Sessum then saw Gary Acreman, accompanied by a man later identified as James Dexter Robinson, grab the girl. *Id.* at 4, 33. Sessum could hear the girl for the next several minutes then her calls for help became quiet. *Id.* at 3. Approximately 5 or 10 minutes after Acreman had grabbed the girl and disappeared with her, Clarence Brandley arrived on the scene and was told not to go into the restroom because there was a girl inside. *Id.* at 4, 33.

Sessum explained that he had lied in his statements and during his trial testimony because both Gary Acreman and Ranger Styles had threatened and intimidated him. *Id.* at 33-34. Acreman drove Sessum home from

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6. After Sessum revealed that Gary Acreman had talked to the girl moments before her death, both Gary Acreman and fellow janitor Sam Martinez admitted at the post conviction hearing that Sessum was telling the truth about Acreman having talked to the victim. Acreman claimed that he had never before revealed that he had talked to the victim because it had completely "slipped his mind" until the post conviction hearing seven years after the murder. It must be noted that Acreman failed to reveal he had spoken to the victim at Brandley's first trial, specifically denied under oath that he had ever spoken to the victim at Brandley's second trial, and failed to mention he had spoken to the victim moments before her death in either of his two sworn pretrial statements. It must additionally be noted that Sam Martinez withheld revealing that Acreman had talked to the victim in both of his sworn pretrial statements, his testimony at both Brandley's first and second trials and his testimony at Brandley's first post conviction hearing in 1986. Like Acreman, Martinez waited seven years to disclose that Acreman had talked to the victim and only admitted to the truth after it had first been revealed by John Sessum. Appendix for Respondent, Exhibit C, at 3, 7, 35.

the high school on the day of the murder. *Id.* at 34. While riding home, Acreman warned Sessum not to tell anyone that he had talked with the girl. *Id.* Acreman also drove Sessum to the police station when Acreman and Sessum gave their first statements and to the school for the walk through, after which they gave additional statements. *Id.* On both occasions Acreman again warned Sessum not to tell anyone he had talked with the girl outside the restroom moments before her murder. *Id.* In March of 1987, shortly after Sessum first revealed Gary Acreman's involvement in the murder, a stranger assaulted Sessum as he was riding his bicycle home from work. *Id.* The stranger first verified that he was John Sessum, punched Sessum and then inquired about the videotape Sessum had made which implicated Acreman in the murder. *Id.*

Sessum also testified at the evidentiary hearing that he was intimidated by Texas Ranger Wesley Styles and was afraid to tell Styles the truth. *Id.* at 33. At one point during the walk through, Sessum tried to tell Styles about Acreman's involvement with the victim but Styles threatened to arrest Sessum if he didn't cooperate. *Id.* Sessum testified that he was still afraid of Ranger Styles at the time of the hearing in 1987. *Id.*

The trial court found, based on John Sessum's demeanor and his answers to questions on direct and cross-examination, and the Court's own questioning, that John Sessum was a credible witness and that his testimony was truthful. *Id.* at 4.

Sessum was not the only janitor threatened and intimidated by Ranger Styles. Henry "Ickie" Peace, the janitor who had been the key State's witness at Brandley's trials, revealed for the first time at the post conviction hearing how Ranger Styles had threatened and mistreated him and how the police had forced him to sign his state-

ment shortly after the murder at the high school. *Id.* at 32. Ranger Styles had appeared at Peace's home sometime after dark. *Id.* Styles then took Peace to a small rural police station and kept him there until 1:30 in the morning. *Id.* While in Style's car enroute to the station, Styles threatened to blow Peace's brains out. *Id.* Styles also roughed-up Peace and threatened him at the station. *Id.* At one point, Styles grabbed Peace by a chain he wore around his neck, twisted the chain and then shoved Peace up against the wall while choking him with the chain. *Id.* The trial court noted how Peace is a very small man, perhaps less than five feet tall, while Styles is a large man, over six feet tall and well built. *Id.* Peace testified that he was afraid of Ranger Styles when Styles interrogated him in 1980 shortly after the murder and that he was still afraid of Styles at the time of the post conviction hearing in 1987. *Id.*

Peace revealed at the post conviction hearing that he had complained to the District Attorney's office that he had been threatened and roughed-up by Ranger Styles. *Id.* at 33. The District Attorney warned Peace that he was "hallucinating" and "imagining things" and that Peace couldn't prove it anyway because it would be his word against the Ranger's. *Id.* The District Attorney never disclosed to defense counsel the *Brady* material that Peace, the State's key witness at Brandley's trial, had informed the District Attorney that he had been threatened and intimidated by the very Ranger whom the District Attorney had selected to lead the investigation. *Id.* Accordingly, defense counsel only first learned of the threats against Peace when Peace testified at the post conviction hearing seven years after Brandley's conviction.

In addition to suppressing the information that the State's key witness had been threatened and intimidated

by a law enforcement officer, the District Attorney, notwithstanding his knowledge that Peace had complained of the threats and mistreatment from Ranger Styles, failed to correct Peace's false testimony at trial when Peace denied, upon cross-examination by defense counsel, that Styles had mistreated him.[7]

Peace additionally revealed at the evidentiary hearing that the police would not allow him to leave the police station until he had signed a written statement, despite his inability to read or write. Appendix for Respondent, Exhibit C, at 32. When Peace asked if his sister or brother could read the statement to him, prior to his signing, the police refused. *Id.* Peace was then left with no alternative but to sign the statement which the police had composed: "I signed a piece of paper that had a bunch of letters on it, bunch of words, I don't know what it said." Evidentiary Hearing Transcript, R. II, 30.

Lorna Hubbell, now a probation officer in Houston, Texas, testified at the evidentiary hearing regarding her interview with Gary Acreman in November of 1980, a few months after the murder at the high school. Appendix for Respondent, Exhibit C, at 4. During her interview, Acreman became extremely nervous when questioned about the events at the high school on the day of the murder and began shaking violently. *Id.* Acreman was very concerned about John Sessum and asked repeatedly, throughout the interview: "What was John saying", about the girl's murder. *Id.* The trial court found that Lorna Hubbell was a credible witness and that her testimony was truthful and unrebutted. *Id.*

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7. The opinion setting aside Brandley's conviction sets forth verbatim Peace's false testimony at trial. *Ex Parte Brandley*, 781 S.W.2d at 894 n. 8. The opinion suggests that the district attorney's failure to correct Peace's false testimony at trial "arguably supports yet another due process violation: The State's use of perjured testimony." *Id.*

Brenda Medina testified at the 1986 post conviction hearing. *Id.* at 12. At the time of the murder at the Conroe High School, she and James Dexter Robinson, a former janitor at the high school who had recently been fired, were living together. *Id.* On the day of the murder, James Dexter Robinson came home sometime after midnight, awakened Ms. Medina and warned her that he had to leave the state because he had killed a girl. *Id.* Robinson assured Medina that he had hidden the girl's body well enough so that no one would find the body until he was out of town. *Id.* When Robinson left town early that morning, he left behind his tennis shoes which had spots of blood on them. *Id.*

Sometime in May of 1986, Brenda Medina first revealed to her attorney, W. B. Etheridge, the substance of Robinson's extra-judicial confession on the evening of the murder. *Id.* Etheridge then immediately informed the District Attorney, Peter Speers. *Id.* The District Attorney failed to disclose to defense counsel Robinson's confession, however, and in fact denied, in open court, that any exculpatory evidence existed. *Id.* The Sunday night before the 1986 evidentiary hearing, Etheridge also informed Clarence Brandley's attorney, Mike DeGeurin. *Id.* Etheridge felt compelled to contact DeGeurin when he discovered that the District Attorney had never disclosed to defense counsel Robinson's extra-judicial confession. *Id.* Had Brenda Medina's attorney not alerted defense counsel, the District Attorney would have succeeded in suppressing the exculpatory evidence of Robinson's confession.

Brandley introduced into evidence at the post-conviction hearing two video tape statements of Gary Acreman. *Id.* at 5. In the first statement dated March 17, 1987, Acreman admits that he did in fact talk with the victim moments before her death, as John Sessum had previously

exposed. *Id.* at 5-6. Acreman did not admit, however, that he had followed the victim up the stairs as she proceeded towards the restroom. *Id.* at 6. Nor did Acreman admit that he had grabbed the girl and dragged her into the restroom. *Id.* Instead, Acreman revealed on his video interview that it was former janitor James Dexter Robinson, not himself, who had followed the girl up the stairs and grabbed her. *Id.* After Robinson had grabbed the girl, she called "No!" and "Help!" as Robinson dragged her into the bathroom. *Id.* According to Acreman, Clarence Brandley was not present when Robinson grabbed the girl and dragged her into the bathroom, but arrived on the scene a few minutes later after her screams for help had been silenced. *Id.* When Brandley arrived, Acreman told him not to go in the restroom because there was a girl inside. *Id.* Acreman did not tell Brandley, however, that the girl had been dragged into the restroom against her will or that Robinson was in the restroom with her. *Id.*

On March 20, 1987, Acreman permitted the videotaping of another interview. *Id.* In the second statement, Acreman reiterates that former janitor James Dexter Robinson grabbed the victim and dragged her into the bathroom before Brandley arrived. *Id.* Acreman additionally reveals that he saw James Dexter Robinson throw the victim's clothes in a dumpster behind the school. *Id.* After hearing testimony from numerous witnesses and assessing their respective demeanors, the trial court found Gary Acreman was in no way coerced or intimidated and that he freely and voluntarily made both the March 17, 1987 and March 20, 1987 video tape statements. *Id.* at 5-7.

In addition to his two video tape statements, Acreman again insisted in a taped telephone conversation with the

district attorney's office that ex-janitor Robinson was present at the high school on the morning of the murder and that Robinson threw clothes into the dumpster where the victim's clothes were eventually found by the Conroe Police Department. *Id.* at 7.

Edward Payne, Gary Acreman's father-in-law, testified at the post-conviction hearing. *Id.* at 9. Payne stated that on the day of the murder, Saturday, August 23, 1980, Acreman came home from his work at the high school and was acting very nervous, was "shaking real bad", and kept pacing back and forth. *Id.* Gary Acreman appeared so completely shaken that Payne thought he was on the verge of a nervous breakdown. *Id.* Acreman then told Payne that a girl had been killed at the high school and that he wanted to go back to the school and help find the girl's clothes. *Id.* Two days later, the Conroe Police Department found the girl's clothes in a plastic bag located in the school dumpster. *Id.* The trial court found that Edward Payne was a credible witness and that his testimony was truthful. *Id.* at 10.

Georgia Cooper, Roger White, and Connie Jane Miller all testified at the post-conviction hearing. *Id.* at 10-11. While at the City Cab Company in Conroe, Texas shortly after the rape and murder at the high school, all three witnesses heard Gary Acreman, who was employed part-time as a cab driver, boast that he knew who had committed the murder and that it wasn't Clarence Brandley. *Id.* The trial court found that Georgia Cooper, Roger White and Connie Jane Miller were credible witnesses and that their testimony was truthful. *Id.*

Cheryl Bradford testified at the evidentiary hearing. *Id.* at 16. Bradford had been a student volleyball player for Waller High School in 1980 and was present at Conroe High School on the day of Cheryl Fergeson's

murder. *Id.* Cheryl Bradford knew Cheryl Fergeson and saw her as they passed in the hallway. *Id.* As they passed, Bradford was returning from the restrooms to the gym and Cheryl Fergeson was headed in the direction of the restroom from the gym area. *Id.* Bradford returned to the gym after she had passed Cheryl Fergeson in the hall. *Id.* Approximately 20 to 30 minutes later, Bradford noticed two men rushing across the top of the bleachers in the gym and then exit a door to the outside of the school. *Id.*

Bradford described the two white males by hair style and color and one of the men by weight and build, and her general description of the two men matched the general description of Gary Acreman and James Dexter Robinson.[8] *Id.*

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8. Regarding Cheryl Bradford's description of the two men, Montgomery County makes the accusation that "The 2majority (sic) has flatly misstated the record" because "the *only* description gi$ven (sic) by Bradford of either of the two men was that one of them was 'thin, average built' " Petition for Writ of Certiorari, at 20, n.9. (all typographical errors and emphasis in original). A review of the record reveals that it is Montgomery County, not the Court of Criminal Appeals for the State of Texas, who has flatly misstated the record. Despite Montgomery County's claim that "Bradford's "only" description is that "one" was "thin, average built", the record reflects that Bradford described both of the men by race, hair style and hair color and one of the men by weight and build:

"Q. [BRANDLEY'S COUNSEL] Let me ask you this: First of all, were they white?

A. [BRADFORD] Yes, sir, *two white guys.*

Q. Would you describe them a little further,

A. Okay. I didn't really get—I didn't get a front view of the two guys. I just saw them from the side. Like I said, I wasn't paying attention to the two guys, but one was, he was *kind of thin, average-built* guy, I guess, with *dark hair,* and it was *longer-type hair.* That was the hair style back then. You wear your *hair to the earlobes then down to about the bottom of the collar.* Then one had *dusty brown hair.* It was *about the same length,* maybe *the dark-haired one was a little longer haired.*" Evidentiary Hearing Transcript, R. II, 102-103.

When Cheryl Bradford returned home on the afternoon of the murder, she told her volleyball coach, Sylvia Ash, that she had some important information that the police should know regarding Cheryl Fergeson's murder. Appendix for Respondent, Exhibit C, at 16. Bradford and her coach then called the Conroe Police Department and reported the information regarding the two men who had rushed through the gymnasium shortly after the approximate time of the murder. *Id.*

While Bradford was watching the "60 Minutes" program during the spring of 1987, she got "chills" when she saw the photograph of James Dexter Robinson shown on the television. *Id.* at 17. Bradford thereafter contacted the authorities to again report the information that she had seen two white males rush through the gym and exit the school. *Id.* The State offered no explanation at the post conviction hearing, or at any other time, why they never pursued Bradford's information nor why it was never disclosed to defense counsel. The trial court found that Cheryl Bradford was a credible witness and that her testimony was truthful. *Id.*

Sam Martinez testified at the evidentiary hearing. *Id.* at 35. He reiterated that Gary Acreman did not really remain in the exclusive company of the other janitors during the approximate time of the murder, but left twice as the janitors waited for Brandley at the vocational building next to the high school. Evidentiary Hearing Transcript, R. X, 1531, 1533, 1541. Acreman first left the group accompanied by Sam Martinez. *Id.* at 1541. When Acreman and Martinez returned, Acreman left a second time alone and entered the high school. *Id.* at 1541-42. When Acreman left the group of janitors the second time and entered the high school alone, Martinez estimated that Acreman may have been gone for as long as 30 minutes. *Id.* at 1539.

Type A Blood was found on the shirt of the victim. Appendix for Respondent, Exhibit C, at 17. Although the victim had Type A blood, the lack of lacerations on her body indicated the blood may have originated from the perpetrator. *Ex Parte Brandley,* 781 S.W.2d at 890. During the course of the murder investigation, the District Attorney learned that Clarence Brandley has Type O blood. Appendix for Respondent, Exhibit C, at 17. The Montgomery County District Attorney resisted all efforts by defense counsel, however, to obtain blood samples from Acreman and the other janitors present when the victim approached the restroom. *Id.* Not until seven (7) years after the murder, when the Attorney General for the State of Texas became concerned about the validity of Brandley's Montgomery County conviction, were blood samples finally obtained from Gary Acreman and James Dexter Robinson.[9] *Id.* at 17, 27. The Attorney General's investigation revealed that both Acreman and Robinson have type A blood. *Id.* at 17, 27-28. The trial court entered a finding of fact that in the circumstantial case against Brandley it would have been important for the jury to have learned that another janitor had the same type blood that had been found on the victim's clothes. *Id.* at 28.

A Caucasian pubic hair was found near the victim's vagina. *Id.* at 21, 28. Tests revealed the hair belonged to neither the victim nor her boyfriend. *Id.* Despite the fact that a Caucasian pubic hair was discovered near the victim's vagina, the District Attorney successfully resisted all efforts by defense counsel to obtain hair samples from Gary Acreman and the other Caucasians who were in the immediate vicinity of the victim moments

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9. The Attorney General for the State of Texas has not endorsed Montgomery County's Petition for Writ of Certiorari.

before her abduction and murder.[10] *Id.* at 17, 21, 28. As the Texas Court of Criminal Appeals noted in its opinion setting aside Brandley's conviction, it would now be futile to finally obtain a hair sample from Acreman and Robinson because the Caucasian pubic hair found near the victim's vagina became lost, along with other trial exhibits, while in the custody of Montgomery County following Brandley's conviction. *Ex Parte Brandley*, 781 S.W.2d at 890 n. 3; Appendix for Respondent, Exhibit C, at 21.

During the autopsy performed on the victim, cotton swabs were used to take fluid samples from the victim's vagina. Appendix for Respondent, Exhibit C, at 26. While the swabs tested positive for sperm, no tests were performed to establish the blood type of the donor. *Id.* No record exists as to when the vaginal swabs were discarded or who discarded them. *Id.* The swabs were not available for examination by defense counsel, however, when requested shortly after the murder. *Id.* An expert in the field of sex crimes investigations from the Homicide Division of the Houston Police Department testified at the Brandley's post conviction hearing. *Id.* at 27. The expert related how it had been standard procedure at the time of the murder in 1980 to preserve the vaginal swabs recovered from the victim of a sexual assault, and that there existed no justification to discard the swabs because through proper testing they could have scientifically excluded suspects based on the blood type, RH factor and other genetic characteristics of the donor of the sperm. *Id.*

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10. Had Montgomery County disclosed to defense counsel Cheryl Bradford's information that two white males had rushed through the gymnasium shortly after the victim's disappearance, the District Attorney might not have succeeded in blocking all defense attempts to obtain hair and blood samples from Acreman and the other janitors. Additionally, had Montgomery County not suppressed Bradford's information, the critical fact of ex-janitor Robinson's presence at the

II.

THERE ARE NO SPECIAL AND IMPORTANT REASONS TO GRANT THE WRIT

Montgomery County has engaged in a classic example of *ignoratio elenchi* by purposely mischaracterizing the holding of the opinion by the Texas Court of Criminal Appeals. Whereas the Texas court found a due process violation under *Brady v. Maryland,* 373 U.S. 83, 83 S. Ct. 1194, 10 L.Ed.2d 215 (1963), based on Montgomery County's suppression of favorable evidence, Montgomery County ignores the *Brady* holding and instead contrives a holding it calls "ineffective assistance of police". Petition for Writ of Certiorari, at 22. Montgomery County's apparent motive in manufacturing a preposterous holding is to attempt to obtain certiorari by characterizing the decision in such a manner that the opinion contravenes this Court's decisions, and is in conflict with state courts of last resort and federal courts of appeals.

Without offering any citation to the portion of the opinion referred to, "the holding in the instant case", according to Montgomery County, is:

> "that the failure of the police to follow certain supposed leads or to perform certain scientific tests violates a defendant's due process rights." *Id.* at 11.

Montgomery County then postulates, again without offering any citation to the opinion, that the Texas court:

> "has imposed upon the State a broad and unprecedented due process obligation to perform an investigation that pursues every lead, conducts all conceivable scientific tests, and preserves all evidence, even though the evidence available to the police points only to the accused." *Id.* at 8.

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high school on the morning of the murder might have been discovered prior to trial, instead of being exposed by Gary Acreman and John Sessum seven (7) years after Brandley's conviction.

Montgomery County complains that the "basic underpinning" of the "holding" of the Texas court is that the "police could have and should have done a better job than they did," and argues that the Texas court therefore created a new category of due process error called "ineffective assistance of police". *Id.* at 22-23.

An analysis of the opinion by the Texas Court of Criminal Appeals exposes the artifice employed by Montgomery County. The Texas court did make note, in considering the totality of the circumstances while making the materiality determination required in a claim under *Brady v. Maryland, supra,* that Montgomery County had failed to properly analyze the victim's vaginal swabs and investigate the fact that a Caucasian pubic hair was found near the victim's vagina and that two white males were observed rushing from the gym shortly after the victim was attacked. Nowhere in its opinion does the Texas Court of Criminal Appeals hold, however, "that the failure of the police to follow certain supposed leads or to perform certain scientific tests violates a defendant's due process rights." Likewise, the opinion does not "impose upon the state a broad and unprecedented due process obligation", as Montgomery County complains, "to perform an investigation that pursues every lead, conducts all conceivable scientific tests, and preserves all evidence, even though the evidence available to the police points only to the accused." Nor is the "basic underpinning" of the "holding" of the court that "the police could have and should have done a better job than they did", as Montgomery County contends. Granted, the opinion of the Texas Court of Criminal Appeals did not approve of the way Ranger Wesley Styles handled witnesses during his investigation, such as threatening to arrest John Sessum when Sessum attempted to tell the truth and deviate from Acreman's story at the walk-through, or threatening to

blow Henry Peace's brains out and later forcing Peace up against a wall and choking him with the chain he wore around his neck. Nor did the opinion condone the police forcing the illiterate Peace to sign a statement he couldn't read or ignoring the Caucasian pubic hair found near the victim's vagina and the lead that two white males had suspiciously rushed through the gym and out of the school shortly after the victim's disappearance. Nowhere in the opinion, however, does the Texas Court of Criminal Appeals hold that Brandley's due process rights were violated because "the police could have and should have done a better job than they did." While Montgomery County's contention that Brandley's rights were violated by "ineffective assistance of police" may be catchy and clever, it is a gross mischaracterization of the opinion by the Texas Court of Criminal Appeals.

Montgomery County additionally insists that:

> "the Court of Criminal Appeals likewise found that the loss of certain physical evidence violated Brandley's due process rights, even though Brandley did not show, and the Court did not find, the bad faith required by *Arizona v .Youngblood,* 488 U.S. ___, 109 S.Ct. 333 (1988)". Petition for Writ of Certiorari, at 9.

If a reader were to take Montgomery County's statement at face value, without reading the opinion written by the Texas Court of Crimnial Appeals, one would be compelled to conclude two things: first, that the Texas court held that the loss of certain evidence violated Brandley's due process rights and second, that the Texas court cavalierly ignored this Court's holding in *Arizona v. Youngblood, supra,* by dispensing wih the bad faith requirement. Neither is true, however, and Montgomery County has again engaged in intellectual dishonesty. A simple reading of the opinion reveals that the Texas Court

of Criminal Appeals did not find a due process violation based on lost evidence. Nor did the court ignore *Arizona v. Youngblood, supra,* and disregard the necessity of a bad faith finding. In fact, the Texas court specifically acknowledged the necessity for a showing of bad faith:

> "Absent a showing of bad faith on the part of the police, failure to preserve potentially useful evidence does not, in and of itself, result in the denial of due process of law. *Arizona v. Youngblood,* ____U.S. ____, 109 S.Ct. 333, 337, 102 L.Ed.2d 281." *Ex Parte Brandley,* 781 S.W.2d at 894.

The Texas Court considered the State's failure to preserve evidence only as one factor of the totality of the circumstances in determining the materiality of Montgomery County's suppression of evidence. Because the Texas Court of Criminal Appeals recognized that State misconduct, such as the suppression of *Brady* material, is more likely to affect the outcome of a trial based solely on circumstantial evidence, the court noted that Montgomery County's refusal to perform certain scientific tests on the available physical evidence contributed to the lack of direct evidence, and therefore strengthened Brandley's claim that Montgomery County's improper conduct was material to the outcome of his trial.

III.

THE TEXAS COURT OF CRIMINAL APPEALS PROPERLY APPLIED THE MATERIALITY TEST IN FINDING A DUE PROCESS VIOLATION UNDER *BRADY V. MARYLAND*

From the very outset of its opinion, the Texas Court of Criminal Appeals made clear that Brandley's case involved the issue of Montgomery County's suppression of exculpatory evidence. The Texas Court identified the

Brady issue in only the second paragraph of the introduction to its opinion:

> "Applicant's petition for writ of habeas corpus raises seven grounds, one of which alleges that the State's investigative procedure violated his right to due process of law and a fundamentally fair trial. One of the facts underpinning that assertion demonstrates that *the State failed to provide appellant's counsel with potentially exculpatory information in the State's possession* that two men were witnessed near the scene of the crime shortly after the victim was last seen alive." *Ex Parte Brandley,* 781 S.W.2d at 887. (emphasis added)

The Texas Court then briefly summarized, in Part I of its opinion, the findings of fact of the trial judge who presided over the post conviction hearing. The court noted the "overwhelming evidence supporting the trial court's findings", one of which included the fact that Montgomery County had failed to disclose to Brandley's counsel that two white males, whose general description matched the general description of janitor Gary Acreman and recent ex-janitor James Dexter Robinson, hurriedly passed through the gym shortly after the victim was last seen alive. *Id.* at 888, 891.

The Court begins Part II of its opinion with a brief overview of the various contexts in which a due process violation may arise during investigation and trial, including the State's failure to correct unsolicited perjury, citing *Napue v. Illinois,* 360 U.S. 264, 269, 79 S.Ct. 1173, 1177, 3 L.Ed.2d 1217 (1959), and the State's suppression of evidence favorable to the accused, citing *Brady v. Maryland,* 373 U.S. 83, 87, 83 S.Ct. 1194, 1196-97, 10 L.Ed. 2d 215 (1963).[11] *Ex Parte Brandley,* 781 S.W.2d at 891-92.

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11. Montgomery County claims that nothing in the record implicates the principle of the government's failure to correct perjured

The Court noted the significance of Montgomery County's suppression of the information that a white male meeting Gary Acreman's general description had been observed near the scene of the crime shortly after the victim's death: the information undermines Acreman's trial testimony (since recanted on video tape) that he was at a different building together with the other janitors at the time of the murder, and additionally establishes that there were other suspects to the crime. *Id.* at 892. The Court then acknowledged that Brandley's pleadings have raised a claim under *Brady v. Maryland, supra,* regarding Montgomery County's suppression of this evidence:

> "A review of applicant's pleadings reflects that applicant, albeit inartfully, alleges that this evidence supports a due process claim under *Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 which prohibits State suppression of 'evidence favorable to an accused . . . where the evidence is material either to guilt or to the punishment, irrespective of the good faith or bad faith of the proscution." *Id.* at 87, 83 S.Ct. at 1196. *Ex Parte Brandley,* 781 S.W.2d at 892.

After acknowledging that Brandley has raised a *Brady* claim premised upon Montgomery County's suppression of evidence, the court properly identified the materiality test as set forth by this Honorable Court:

> "In *United States v. Bagley,* 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985), the Supreme Court held that the due process requirements addressed in *Brady,* supra, applied to the suppression of impeachment evidence, and where such evidence was sup-

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testimony. Petition for Writ of Certiorari, at 23. The Texas Court of Criminal Appeals suggested, however, that a due process violation may have arisen when the district attorney failed to correct Henry Peace's false testimony that he was not mistreated by Ranger Styles. *Ex Parte Brandley,* 781 S.W.2d at 894, n. 8.

> pressed, a new trial must be granted where the confidence in the outcome of the trial is undermined. *Bagley,* at 683, 105 S.Ct. at 3383. To require reversal pursuant to a *Brady* claim, however, the State's suppression of evidence must be considered material. Evidence is considered material where there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. *Bagley,* at 682, 105 S.Ct. at 3383 (1985)." *Id.* at 892-93.

Quoting *United States v. Agurs,* 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976), the court further recognized that in making the materiality determination, the suppressed evidence "must be evaluated in the context of the entire record", and "if the verdict is already of questionable validity, additional evidence of relatively minor importance might be sufficient to create a reasonable doubt." *Ex Parte Brandley,* 781 S.W.2d at 893.

Pursuant to the express dictates of *Agurs,* the court then proceeded to evaluate the suppressed evidence in the context of the entire record. *Id.* at 893-94. The court analyzed the walk through of janitors Acreman, Sessum and Martinez, where Acreman did most of the talking, and noted that Ranger Styles threatened to arrest John Sessum when he attempted to reveal Acreman's involvement in the murder. *Id.* at 893. The court further considered how both Acreman and Martinez admitted seven years after Brandley's conviction that their walk through statements and trial testimony were false in that Acreman did in fact speak with the victim moments before her death and that Acreman did not remain at another location in the presence of the other janitors during the period immediately after Acreman had spoken with the victim and the victim was murdered. *Id.* In considering the materiality of the State's suppression that two white males, one generally matching the description of Acreman, were

seen in the vicinity of the murder shortly after the victim was last seen alive, the court reviewed the physical evidence in the record. *Id.* at 894. The court noted that a Caucasian pubic hair was found near the victim's vagina, yet Montgomery County refused to take a hair sample from Acreman and successfully resisted defense efforts to obtain a sample of Acreman's hair for comparison. *Id.* Montgomery County also refused to obtain a blood sample from Acreman even though blood inconsistent with Brandlay's was found on the victim's shirt. *Id.*

Not only did the court note that the evidence against Brandley was entirely circumstantial, the court explained how the State was responsible for the lack of direct evidence by refusing to perform available tests on the physical evidence at hand. *Id.*

After weighing the totality of the circumstances, and after having expressly acknowledged that additional evidence of relatively minor importance might be considered material if the verdict is already of questionable validity, the court sustained Brandley's *Brady* claim, concluding that Montgomery County's investigative procedure violated Brandley's right to due process by suppressing evidence favorable to the accused:

> "Although any of these incidences alone might not support applicant's claim, there can be no doubt that the cumulative effect of the investigative procedure, judged by the totality of the circumstances, resulted in a deprivation of applicant's right to due process of law *by suppressing evidence favorable to the accused,* and by creating false testimony and inherently unreliable testimony. Accordingly, applicant's conviction must be reversed." *Id.* (emphasis added)

Perhaps the Texas Court of Criminal Appeals might have drafted an opinion which set forth with more exacting precision its application of the materiality standard

for Brandley's *Brady* claim. Regardless of whether the Texas court might have authored a more sublime opinion, Montgomery County's criticism of the opinion is without merit. For example, Montgomery County boldly claims in its Petition for Writ of Certiorari that "The majority made no attempt to explain how the disclosure to the defense of the evidence discussed above [Cheryl Bradford's testimony that two white males had rushed through the gymnasium shortly after the victim disappeared] even remotely could have affected the outcome of Brandley's trial." Petition for Writ of Certiorari, at 21. A mere reading of the opinion, however, reveals that Montgomery County's allegation is entirely false. On two occasions, the Texas Court of Criminal Appeals expressly explained the significance of Cheryl Bradford's information which Montgomery County had successfully suppressed. Initially, the Court explained that:

> "Bradford's statements undermine the State's theory of the case that applicant was the only janitor whose presence was unaccounted for at the time of, and following the murder. Additionally, this information conflicts with the now recanted trial testimony of Acreman, Martinez and Sessum that they were exclusively in each other's company after the girl entered the restroom."[12] *Ex Parte Brandley,* 781 S.W. 2d at 891 n. 5.

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12. It must be noted that Montgomery County continues to this date to adhere to the theory that Acreman and the other janitors left together for another building, when the victim entered the restroom, and remained exclusively in each other's presence at the approximate time of the victim's disappearance. In the "Statement of facts" section of its Petition for Writ of Certiorari, Montgomery County tells this Court, "the four janitors waited for Brandley on the lawn outside," thereby leaving the impression that none of the janitors left. Petition for Writ of Certiorari, at 6. Montgomery County would lead this Court to believe that all of the janitors remained together waiting despite Sam Martinez's testimony that Acreman in fact left the group twice: the first time with Martinez, and the second time to return alone to the high school where Acreman may have been gone for as long as 30 minutes.

The court then further explains the significance which Cheryl Brandford's information would have had at trial had Montgomery County not successfully suppressed the information:

> "The State's suppression of Bradford's information that she saw a man meeting Acreman's description near the scene of the crime shortly after the victim was attacked undermines Acreman's now recanted testimony that he was in a different building with the other janitors at the time in question. At the very least, it establishes that men other than applicant were near the scene of the crime shortly after the victim was last seen alive. Given Bradford's hearing testimony that she saw no men attending the volleyball tournament at the time in question, this information becomes more significant by establishing other suspects, if not impeaching Acreman's testimony regarding his whereabouts." *Ex Parte Brandley,* 781 S.W.2d at 892.

In an apparent attempt to alarm this Honorable Court, Montgomery County further claims that "following *Ex Parte Brandley,* it appears that in Texas, the cumulation of meritless claims can equate to a due process violation." Petition for Writ of Certiorari, at 21. Again, Montgomery County's allegation is without merit. The Texas Court of Criminal Appeals did not hold that the cumulation of frivolous claims violated Clarence Brandley's right to due process. Nor did the court hold that Brandley's due process rights were violated by "ineffective assistance of police", as also urged by Montgomery County. The Texas Court of Criminal Appeals simply held that Montgomery County violated Clarence Brandley's right to due process by suppressing Cheryl Bradford's information that two white males, whose general description matched the general description of janitor Gary Acreman and recent ex-janitor James Dexter Robinson, rushed through the gymnasium

and left the school building shortly after the victim was last seen alive.

IV.

THE TEXAS COURT OF CRIMINAL APPEALS DID NOT ANNOUNCE A NEW CONSTITUTIONAL RULE ON COLLATERAL REVIEW

Montgomery County complains that the court's "ineffective assistance of police" holding applies a new rule of federal constitutional law on collateral review. This complaint is without merit. As previously discussed in Part II, the Texas Court of Criminal Appeals did not hold, as claimed by Montgomery County, "that the failure of the police to follow certain supposed leads or to perform certain scientific tests violates a defendant's due process rights." Petition for Writ of Certiorari, at 11. Nor did the court impose upon the State, as Montgomery County fears, "a broad and unprecented due process obligation to perform an investigation that pursues every lead, conducts all conceivable tests, and preserves all evidence, even though the evidence available to the police points only to the accused." *Id.* at 8. Putting aside Montgomery County's mischaracterization of the opinion, the decision of the Texas Court of Criminal Appeals is neither novel nor a new application of federal constitutional law. The court simply held that Montgomery County violated Brandley's due process rights under *Brady v. Maryland, supra,* by suppressing the information that two white males, whose general description matched the general description of janitor Gary Acreman and ex-janitor James Dexter Robinson, were seen suspiciously rushing through the gymnasium shortly after the victim was last seen alive, when, in light of the totality of the circumstances: the case against Brandley consisted of only circumstantial evidence; a Caucasian pubic hair not belonging to the victim or her

boy friend was found near the victim's vagina; type A blood not matching Brandley's type O blood was found on the victim's shirt (Acreman and Robinson were later discovered to have type A blood seven years after Brandley's conviction); and the State advanced the theory at trial that Brandley was the only person who could have possibly committed the crime because the four other janitors exclusively remained in each other's company at another building at the time of the murder.

CONCLUSION

There are no special and important reasons to grant Montgomery County's Petition for Writ of Certiorari. The decision by the Texas Court of Criminal Appeals properly applied the materiality test in finding a due process violation under *Brady v. Maryland, supra,* by considering the totality of the circumstances, including the trial court's findings of fact based on the extensive post conviction hearings.

The Texas Court of Criminal Appeals did not decide a federal question in a way that conflicts with the applicable decisions of this Court. Nor did the Texas Court of Criminal Appeals decide a federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals.

Respondent, Clarence Lee Brandley, respectfully prays that this Court refuse to grant Montgomery County's Petition for Writ of Certiorari to the Texas Court of Criminal Appeals.

Respectfully submitted,

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Counsel of Record

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Attorneys for Respondent

Supreme Court, U.S.
FILED
AUG 13 1990
JOSEPH F. SPANIOL, JR.
CLERK

APPENDIX FOR RESPONDENT

NO. 89-1887

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

THE STATE OF TEXAS,
Petitioner

v.

CLARENCE LEE BRANDLEY,
Respondent

On Petition for Writ of Certiorari To the Texas Court of Criminal Appeals

APPENDIX TO BRIEF IN OPPOSITION TO STATE'S PETITION FOR WRIT OF CERTIORARI

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EXHIBIT A

THIS IS A CAPITAL CASE

EXECUTION DATE MARCH 26, 1987

NO. 14,666

IN THE DISTRICT COURT OF
MONTGOMERY COUNTY, TEXAS
221st JUDICIAL DISTRICT

EX PARTE
CLARENCE LEE BRANDLEY,
PETITIONER

SECOND APPLICATION FOR
WRIT OF HABEAS CORPUS

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW CLARENCE LEE BRANDLEY, Petitioner in the above styled and numbered cause, by and through his attorneys of record, Mike DeGeurin and Paul Nugent, and files this Second Amended Application for Writ of Habeas Corpus, pursuant to Art. 11.07, Vernon's Annotated Code of Criminal Procedure, and in support of such Application shows:

I.

Petitioner is currently being held in confinement by James Lynaugh, Interim Director of the Texas Department of Corrections, at the Ellis Unit in Huntsville, Texas.

II.

Petitioner is confined pursuant to a conviction in Cause No. 14,666 from the 221st Court of Montgomery County, Texas which was issued on the 14th day of February,

1981. The jury assessed Petitioner the penalty of death. Copies of the docket sheet, indictment, judgment and sentence are attached hereto as Exhibits "A"; "B"; "C" and "D", respectively, and made a part hereof for all purposes.

III.

Petitioner appealed his conviction and death sentence to the Texas Court of Criminal Appeals. The Court of Criminal Appeals affirmed Petitioner's conviction and sentence on May 8, 1985. The Opinion is reported at 691 S.W.2d 699 (Tex. Crim. App. 1985).

IV.

On December 4, 1985, Petitioner filed an Application for Writ of Habeas Corpus in the 221st Judicial District Court of Montgomery County, Texas. Petitioner filed an Amended Application for Writ of Habeas Corpus on July 3, 1986. Petitioner then orally amended his Amended Application for Writ of Habeas Corpus in open court on July 17, 1986.

V.

On July 17, 1986; July 18, 1986; and August 21, 1986, the Honorable Lynn Coker, Judge of the 9th District Court of Montgomery County, Texas, conducted an evidentiary hearing regarding Petitioner's Application. Without docketing the case for submission, the Court of Criminal Appeals denied Petitioner's Application on December 22, 1986.

VI.

Petitioner's previous Application did not contain the allegations now being presented to the Court.

VII.

Petitioner alleges that his confinement is unlawful for each of the following reasons:

1.) THE APPLICATION OF THE DEATH PENALTY TO THE PETITIONER IN THIS CASE CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT IN THAT THE PETITIONER IS INNOCENT.

Critical new evidence establishes Petitioner's innocence. Specifically, two janitors who witnessed the victim's abduction have come forward and given statements which establish that the Petitioner was in no way involved. These statements are recantations of the testimony given at Petitioner's second trial.

It is cruel and unusual punishment to execute an innocent man. The State maintains that the Court has no power, regardless of any new evidence proving the Petitioner's innocence, to prevent his execution. Petitioner submits that neither the Texas Constitution nor the United States Constitution permits the execution of an innocent man.

2.) PETITIONER WAS DENIED DUE PROCESS OF LAW AND A FUNDAMENTALLY FAIR TRIAL BECAUSE THE TRIAL JUDGE AND THE DISTRICT ATTORNEY SYSTEMATICALLY CONDUCTED SECRET EX PARTE DISCUSSIONS REGARDING PETITIONER'S CASE.

Beginning with the commencement of Petitioner's second trial, and lasting until on or about March 5, 1982, the Honorable Trial Judge and the District Attorney

systematically conducted secret ex parte discussions regarding Petitioner's case. During the actual second trial itself, the Honorable Trial Judge and the District Attorney met secretly each morning, outside the presence of counsel for Petitioner, and discussed myriad aspects of Petitioner's trial. When counsel for Petitioner finally learned of the secret ex parte discussions between the Honorable Trial Judge and the District Attorney, counsel confronted the Honorable Trial Judge with such knowledge during an in chambers, non public, hearing on March 5, 1982. After the confrontation, the Honorable Trial Judge recused himself from Petitioner's case.

The secret ex parte discussions between the trial judge and the district attorney secured for the State of Texas an unfair advantage during Petitioner's second trial, denied Petitioner his right to an impartial trial judge, and denied Petitioner due process of law and a fundamentally fair trial.

3.) THE PETITIONER WAS DENIED DUE PROCESS OF LAW WHEN THE TRIAL JUDGE AND THE DISTRICT ATTORNEY SECRETLY AGREED TO CONCEAL FROM DEFENSE COUNSEL THE FACT THAT EVIDENCE HAD BECOME "MISSING" WHILE IN THE CUSTODY OF THE STATE.

Sometime after the conclusion of Petitioner's second trial, an entire box of trial exhibits became "missing" while in the custody of the State. The missing evidence included the two caucasian hair samples found near the victim's vagina which belonged to two persons other than the Petitioner or the victim. Although the exact date that the evidence became missing is not now known, what is

certain is the fact that the Honorable Trial Judge and the District Attorney intentionally agreed not to reveal to defense counsel the fact that evidence was missing. The knowledge of the missing evidence was kept secret from defense counsel from approximately early January 1982 until March 12, 1982, when defense counsel were officially informed that critical trial evidence had been "lost" while in the possession of the State. During this two month period that the Honorable Trial Judge and the District Attorney secretly concealed from defense counsel that evidence was missing, the Honorable Trial Judge and the District Attorney engaged in secret ex parte discussions regarding the missing evidence. The State also attempted to substitute copies of trial documents for their originals in an attempt to secretly reconstruct the record, and thus permanently conceal from defense counsel the fact that critical trial evidence was destroyed. (It must be noted that defense counsel first became aware of the fact that evidence may be missing when defense counsel noticed that the exhibit numbers on some of the substituted documents did not match the original exhibit numbers assigned at trial. This suspicious circumstances, along with other confidential information, prompted defense counsel to confront the Honorable Trial Judge and the District Attorney regarding the possibility that trial evidence was missing. It was only after this confrontation that the Honorable Trial Judge recused himself from further involvement in the case and defense counsel were officially informed on March 12, 1982 that a box of trial evidence which included the critical pubic hair samples, was in fact missing.)

From March of 1982 until the present, counsel for Petitioner have continuously sought to have an evidentiary

hearing regarding the missing evidence. All requests for a hearing, however, have been summarily denied. Counsel for Petitioner do not accept the District Attorney's personal theory, untested in a public evidentiary hearing, that the entire box of trial exhibits, which contained critical evidence for the defense, was accidently thrown out on an unknown date by an unknown janitor or janitors. Counsel for Petitioner submit that the truth regarding the missing evidence will only be revealed when Petitioner is afforded a full and fair public evidentiary hearing.

The agreement between the Honorable Trial Judge and the District Attorney, not to reveal to defense counsel that evidence had become missing while in the possession of the State, denied Petitioner due process of law, and a fair and impartial post conviction process.

4.) DEFENDANT WAS DENIED FUNDAMENTAL FAIRNESS AND DUE PROCESS OF LAW BY THE FACT THAT CRITICAL EVIDENCE HAVING THE POTENTIAL TO PROVE THAT THE PETITIONER IS INNOCENT WAS LOST AND DESTROYED WHILE IN THE EXCLUSIVE POSSESSION OF THE STATE.

The following critical evidence was in the exclusive possession of the State:

1.) THE COTTON SWABS;

Cotton swabs were used to take samples from the victim's vagina shortly after the rape and murder occurred. Semen and live spermatoza were present on the cotton swabs. Scientific analysis of the substances on the swabs could have proven the innocence of the Petitioner. The

cotton swabs were either intentionally or negligently destroyed by the State while in the exclusive possession of the State. They were destroyed before the Petitioner's attorney had an opportunity to have them analyzed.

2.) THE PUBIC HAIRS;

A reddish brown caucasian pubic hair and another brown body hair of probable caucasian origin were found near the victim's vagina. Scientific analysis performed by the Texas Department of Public Safety Crime Laboratory established that these two hairs were neither the Petitioner's nor the victim's. Sometime after the conclusion of the Peitioner's second trial, these hairs were "lost" by the State while in the exclusive possession of the State.

Because the two caucasian hairs found near the victim's vagina were "lost" by the State, the Petitioner is now deprived of an opportunity to prove his innocence by scientifically comparing the two hairs with the pubic hairs of the caucasian murder suspects who have recently surfaced. The loss or destruction of this critical evidence while entrusted to the State of Texas denies the Petitioner his fundamental right to present evidence to prove his innocence.

5.) THE PRETRIAL INVESTIGATIVE PROCEDURES UTILIZED BY THE STATE WERE SO IMPERMISSIBLY SUGGESTIVE OF THE PETITIONER THAT IT CREATED FALSE TESTIMONY CALCULATED TO MANUFACTURE CIRCUMSTANTIAL EVIDENCE AGAINST THE PETITIONER IN VIOLATION OF HIS CONSTITUTIONAL RIGHTS TO DUE PROCESS OF LAW AND A FUNDAMENTALLY FAIR TRIAL.

CLARENCE BRANDLEY became the target of the investigation within hours of the murder when a Conroe police officer stated to Henry "Ickie" Peace and BRANDLEY:

> "One of you two is going to hang for this." The officer then turned towards BRANDLEY and said, "Since you're the Nigger, you're elected."

Once the State had selected Petitioner as the murderer, the State employed an impermissibly suggestive investigative procedure to make its case. Several days after the murder, the investigators took all of the white janitors who were present on the day of the murder and walked then together as a group through the school where the murder occurred. Consistent statements from the group were then developed which isolated the Petitioner in the area of the school where the murder had occurred during the time period that the murder was thought to have occurred. The statements that were obtained were false, but consistent with the State's initial theory that Petitioner was the murderer. At trial, the witnesses were coerced by threats of perjury to testify consistent with their pretrial false statements. This impermissably suggestive procedure is now demonstrated by the fact that two of the four janitors have recanted their trial testimony and admitted that it was false.

Because the "investigation" was designed not to solve the murder, but to convict the Petitioner, Petitioner's Constitutional rights to due process of law and a fundamentally fair trial were violated.

6.) TEXAS' DEATH PENALTY SYSTEM, AS APPLIED, DISCRIMINATES AGAINST BLACK DEFENDANTS IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION.

Petitioner is a black person. The girl who was murdered was white. Petitioner is prepared to present statistical evidence which demonstrates that the Texas death penalty, as applied, discriminates against black persons. Two recent independent studies establish that whether a person is executed in Texas largely depends upon the race of the defendant and/or the race of the victim. The statistical analysis in these studies reveals that a person who kills a white person is five (5) to eight (8) times more likely to receive the death penalty then a person who kills a black person. The statistics establish that throughout the system—from initial criminal investigation through prosecutorial discretion in filing charges, jury selection and the trial itself—there is far greater public horror when the murder victim is white. In Texas, the probability of being executed s further significantly enhanced when a black person is charged with murdering a white person.

The issue of whether the death penalty is applied in a racially discriminatory manner is the idential issue on which the Supreme Court has granted certorari in *McCleskey v. Kemp, cert. granted,* U.S.____, 106 S.Ct. 3331, 92 L.Ed.2d 737 (July 7, 1986) and *Hitchcock v. Wainwright, cert. granted,* ____U.S.____, 106 S.Ct. 2888, 90 L.Ed.2d 976 (June 9, 1986). Both cases are currently pending before the United States Supreme Court.

The racially discriminatory manner in which the Texas death penalty is applied violates Petitioner's Fifth, Sixth, Eighth and Fourteenth Amendment rights under the United States Constitution.

VIII.

Before the State is entitled to put Petitioner to death, Petitioner requests that this Court conduct an evidentiary hearing, pursuant to Article 11.07§2 (d) of the Texas Code of Criminal Procedure, to resolve all controverted, previously unreseolved facts which are material to the legality of Petitioner's confinement.

WHEREFORE, Petitioner prays the Court set this Application for a hearing and, after receiving evidence concerning all controverted and previously unresolved facts, issue a writ of habeas corpus, and enter an order recommending that Petitioner be discharged from further confinement pursuant to the illegal judgment and sentence in Cause No. 14,666.

Respectfully submitted,

FOREMAN & DeGEURIN

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THE STATE OF TEXAS §

COUNTY OF HARRIS §

AFFIDAVIT

BEFORE ME, the undersigned authority on this day personally appeared, Mike DeGeurin, who after being duly sworn stated:

"I am the attorney of record and the attorney in fact for Petitioner, CLARENCE BRANDLEY. I have authority by the Petitioner to sue out this writ. I have read the foregoing Application for Writ of Habeas Corpus and swear that all of the allegations of fact contained therein are true and correct to the best of our information and belief."

Mike DeGeurin

SIGNED AND SWORN to before me on this the 20th day of March, 1987.

Kathryn Arauza, Notary Public
Notary Public in and for
the State of Texas.
My Commission Expires: 3/89

EXHIBIT B

EX PARTE CLARENCE LEE BRANDLEY

WRIT NO. 9,691-03

Habeas Corpus Application

from MONTGOMERY County

O R D E R

This is an application for a writ of habeas corpus which was transmitted to this Court by the clerk of the trial court pursuant to the provisions of Article 11.07, V.A.C.C.P. *Ex parte Young,* 418 S.W.2d 824 (Tex. Cr. App. 1967).

The applicant was convicted of the offense of capital murder. The jury answered the special issues found in Article 37.071(b), V.A.C.C.P. in the affirmative and punishment was assessed at death. On direct appeal, the applicant's conviction was affirmed. Brandley v. State, 691 S.W.2d 699 (Tex. Cr. App. 1985).

In his present application, the applicant contends that he is innocent and thus the application of the death penalty constitutes cruel and unusual punishment, the trial judge and the district attorney engaged in ex parte communications regarding the applicant's case while it was in progress, he was denied due process of law by the judge and the district attorney secretly agreeing to conceal from his attorney the fact that some of the evidence was missing which missing evidence was crucial to his defense, thus denying him fundamental fairness, that the pretrial investigative procedures utilized by the State were so impermissibly suggestive that they created false and

misleading testimony, and that the Texas death penalty scheme, as applied, discriminates against black defendants in violation of the Constitution of the United States.

The trial court has failed to make findings of fact, simply ordering that the application "be transmitted to the Texas Court of Criminal Appeals for that Court to determine whether an evidentiary hearing should be conducted and upon which isues."

It is the Court's opinion that additional facts need to be developed and that the trial court is the appropriate forum. Therefore, the trial court is ordered to hold an evidentiary hearing to allow the applicant to more fully develop his allegations as set out above. The trial court should then make findings of fact as to each of the allegations set out in this order and also should make any further findings of fact and conclusions of law which it deems relevant and appropriate to the disposition of the applicant's application for habeas corpus relief.

Since this Court does not hear evidence, *Ex parte Rodriguez*, 169 Tex. Cr. R. 367, 334 S.W.2d 294 (Tex. Cr. App. 1960), this application for a post-conviction writ of habeas corpus will be held in abeyance pending the trial court's compliance with this order. The hearing ordered herein shall be held within 90 days of the date of this order.[1] A transcription of the court reporter's notes and the trial court's findings of fact shall be returned to this Court within 120 days of the date of this order.[2]

---

1. In the event any continuances are granted, copies of the order granting the continuance should be provided to this Court.

2. Any extensions of this time period should be obtained from this Court.

IT IS SO ORDERED THIS THE 30TH DAY OF JUNE, 1987.

PER CURIAM

En Banc

Do Not Publish

EXHIBIT C

WRIT NO. 9,691-03

IN THE COURT OF CRIMINAL APPEALS
FOR THE STATE OF TEXAS

EX PARTE
CLARENCE LEE BRANDLEY
PETITIONER

IN THE DISTRICT COURT OF
GALVESTON COUNTY, TEXAS
212th JUDICIAL DISTRICT

(Received November 19, 1987)

O R D E R

The Court afforded both Petitioner and The State of Texas a full and fair opportunity to present all evidence pertinent to Petitioner's Second Application for Writ of Habeas Corpus. After ten days of trial, in which the Court heard the testimony of 46 witnesses, in addition to various video taped and audio taped evidence, the Court became convinced that Clarence Lee Brandley did not receive a fair trial, was denied the most basic fundamental rights of due process of law, and did not commit the crime for which he now resides on death row. At the conclusion of the hearing, the Court accordingly rendered from the Bench as follows:

> "This is the 200th anniversary of our Constitution. One of the basic rights of this noble document is equal justice under the law and the inherent dignity of mankind.
>
> "The litany of events graphically described by the witnesses, some of it chilling and shocking, leads me to the conclusion the pervasive shadow of darkness

has obscured the light of fundamental decency and human rights. I can only sadly state justice has been on trial here, but of more significance, injustice has been on trial.

"My statement of facts and conclusions of law to the Court of Criminal Appeals will be conclusive and unequivocable. I shall recommend a new trial for the defendant, and if granted, recommend the trial be removed from Montgomery County."

In accordance with the en banc Order entered by the Court of Criminal Appeals on June 30, 1987, the Court makes the following Findings of Fact:

I.

In his First Claim for Relief, Petitioner alleges:

THE APPLICATION OF THE DEATH PENALTY TO THE PETITIONER IN THIS CASE CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT IN THAT THE PETITIONER IS INNOCENT.

The Court has complied with the June 30, 1987 Order of the Court of Criminal Appeals, which specifically directed the trial court to hear evidence regarding the Petitioner's above-quoted allegation. Based on the extensive testimony received and the credibility determinations regarding said testimony, the court finds that credible and probative new evidence exists which establishes, by a preponderance of the evidence, that Petitioner is innocent of the crime for which he is now under the sentence of death.

The Court further finds that Petitioner has at all times exercised due diligence in an effort to discover the new evidence, and the fact that some of the new evidence was not discovered until shortly before Petitioner's execution

date on March 26, 1987, is in no way related to any lack of due diligence on Petitioner's part. To the contrary, the evidence was unavailable because of an atmosphere of fear, intimidation and racial prejudice, all of which were beyond the control of Petitioner.

Specifically, the Court finds:

1. John Henry Sessum testified at the evidentiary hearing. Sessum was a janitor at Conroe High School on the day that Cheryl Ferguson was raped and murdered. John Sessum and fellow janitors, Gary Acreman and Sam Martinez were waiting at the bottom of the hallway steps when the victim walked up the hallway from the direction of the gym. Gary Acreman commented that the victim was "good looking". Acreman then told the victim where the restroom was and followed the victim up the stairway, talking to her at the top of the landing. (It should be noted that at Clarence Brandley's first trial, Gary Acreman failed to mention that he had ever spoken to the girl; and, at Clarence Brandley's second trial, Gary Acreman specifically denied that he had ever spoken to the victim. Acreman also never informed the authorities in either of his two sworn statements that he had ever spoken to the victim. After John Sessum revealed that Acreman had in fact talked with the girl shortly before her death, Acreman admitted at the Evidentiary Hearing that had in fact talked to the girl. Acreman claimed that he had never before mentioned that he had talked to the girl, however, because it had completely "slipped his mind" until the Evidentiary Hearing.)

While Acreman was talking with the victim at the top of the stairs, John Sesum heard the girl say "No, No" a

couple of times and "Don't" and "Help". John Sessum then saw Gary Acreman grab the girl accompanied by a man whom Sessum later identified as James Dexter Robinson. Sessum could hear the girl for the next several minutes then her calls for help became quiet. Approximately 5 or 10 minutes after Acreman had grabbed the girl and disappeared with her, Clarence Brandley arrived on the scene and was told not to go into the restroom because there was a girl inside. Based on John Sessum's demeanor and his answers to questions on direct, cross-examination and the Courts own questioning, the Court finds that John Sessum is a credible witness and that his testimony was truthful.

2. Lorna Hubbell testified at the evidentiary hearing. Ms. Hubbell is now a 32 year old probation officer for Harris County, Texas. Ms. Hubbell had interviewed Gary Acreman in November of 1980, a few months after the rape and murder occurred at the high school. During her interview, Gary Acreman became extremely nervous when questioned about the events at the high school on the day of the murder. Acreman became so nervous during the interview that he was shaking violently, almost as if he were suffering from delirium tremens ("D.T.'s"). Acreman was very concerned about John Sessum and asked repeatedly throughout the interview: "What was John saying?", about the girl's murder. Ms. Hubbell was a credible witness. Her testimony was truthful and unrebutted.

3. The Petitioner introduced into evidence two video taped interviews of Gary Acreman in which Acreman wholly exonerates Brandley from any wrongdoing in connection with the rape and murder of Cheryl Fergeson. The Court finds that Gary Acreman freely and voluntarily gave the video taped statements and that he was in no way coerced or intimidated.

Gary Acreman testified at the evidentiary hearing. Acreman stated that on March 17, 1987, he visited Don Brown's office (one of Clarence Brandley's attorneys) to try to get in touch with Richard Reyna, an investigator for Brandley. Richard Reyna had earlier tried to contact Acreman at his home but Acreman wasn't in. Later in the day on March 17, 1987, Acreman telephoned Don Brown's office and again asked for Richard Reyna. When Don Brown informed Acreman that Richard Reyna wasn't in, Acreman told Don Brown that he was leaving for Corsicana, Texas. Don Brown suggested that Acreman could call for Richard Reyna once Acreman arrived in Corsicana.

When Acreman arrived in Corsicana, he again telephoned Don Brown's office and asked for Richard Reyna. Acreman then invited Richard Reyna to come to Corsicana so that they could talk. At or about 9:00 P.M. on March 17, 1987, Richard Reyna visited Acreman's motel room. Acreman's wife was also present. Richard Reyna and Acreman, along with James McClosky, another investigator for Petitioner, then went to the restaurant at the Holiday Inn. While at the restaurant, Acreman agreed to give a video tape interview.

In the video tape interview, Acreman admits that he did in fact talk with the victim as John Sessum had previously revealed. Acreman did not state, however, that he had followed the victim up the stairs as she proceeded towards the restroom. Nor did Acreman state that he had grabbed the girl and dragged her into the restroom. Instead, Acreman revealed on his video interview that it was James Dexter Robinson who had followed the girl up the stairs and grabbed her. After Robinson had grabbed the girl, she called "No!" and "Help!" as Robinson dragged her into the bathroom. Clarence Brandley was not present when Robinson grabbed the girl and dragged her into the bathroom. Brandley arrived on the scene a few minutes later. When Brandley arrived, Acreman told him not to go in the restroom because there was a girl in there. Acreman did not tell Brandley that the girl had been dragged into the restroom against her will. Based on the testimony of Acreman, James McCloskey and Richard Reyna, and their respective demeanors in court, the Court finds that Gary Acreman freely and voluntarily made the March 17, 1987 video taped interview, and that Acreman was in no way coerced or intimidated by anyone.

On March 20, 1987, Acreman permitted the videotaping of another interview. In the second interview, Acreman reiterates that James Dexter Robinson grabbed the victim and dragged her into the bathroom wholly outside of the presence of Clarence Brandley. Acreman additionally states that he saw James Dexter Robinson throw the victim's clothes in a dumpster behind the school. At the conclusion of the March 20, 1987 interview, Acreman was afforded the opportunity to add anything further if he so desired.

Based on the testimony of Gary Acreman, Richard Reyna and James McCloskey, and their respective demeanors in court, the Court finds that Gary Acreman freely and voluntarily—without coercion or intimidation —made his videotaped statement on March 20, 1987.

In addition to his statements of March 17, 1987 and March 20, 1987, the Court notes that Acreman had previously testified under oath, at an evidentiary hearing on July 17, 1986, that James Dexter Robinson was present at the high school the day Cheryl Fergeson was raped and murdered. The Court additionally notes that in a March 23, 1987 taped telephone conversation (introduced by the State) with Assistant District Attorney Rick Stover, Acreman again insisted that James Dexter Robinson was present at the high school on the morning of the murder and that Robinson threw clothes into the dumpster where the victim's clothes were eventually found.

Gary Acreman testified on two separate occasions at the evidentiary hearing. Although Acreman admitted that neither Richard Reyna nor Jim McCloskey threatened or coerced him in connection with the two video tape interviews, Acreman made the nebulous assertion that Reyna somehow mysteriously got him to say things he didn't intend to say. Acreman testified that John Sessum was telling the truth when Sessum revealed that Acreman had talked with the girl before she entered the restroom. Acreman stated that he had never before revealed that he had talked to the girl—either in his first sworn pretrial statement, his second sworn pretrial statement, his testimony at the first trial, his testimony at the second trial or in his testimony at the writ hearing in 1986—because "It completely slipped my mind."

Acreman testified that he did in fact tell his father-in-law, Ed Payne, that he had witnessed a person throw the girl's clothes into a dumpster on the day of the murder. Acreman further testified that he was not surprised when the police eventually found the victim's clothes in the dumpster on Monday, August 25, 1980, two days after the murder. Acreman maintained, however, that he did not tell his father-in-law about the clothes on the day of the murder, Saturday, August 23, 1980, as his father-in-law testified. Acreman instead claimed that he had told his father-in-law on Sunday, August 24, 1980, the day after the murder, that he had seen someone throw the girl's clothes into the dumpster.

Although Acreman's father-in-law, Ed Payne, testified that Acreman was acting very nervous and wanted to return to the school after he had told Payne about the girl's clothes being thrown in the dumpster, Acreman testified that it was Payne who wanted Acreman to return to the school. Acreman was unable to offer any explanation, however, why his father-in-law would have wanted him to return to the school.

Based on Gary Acreman's answers to questions and his countenance during the many hours that he was on the witness stand, the Court finds that his testimony at the evidentiary hearing was incredible, untruthful and generally not worthy of belief. The Court further finds that Acreman's testimony at the evidentiary hearing was wholly inconsistent with the credible testimony of eight other witnesses at the evidentiary hearing, to-wit: Lorna Hubbell; John Sessum; Edward Payne; John Payne; Georgia Cooper; Roger White; Connie Miller; and Kathy Binford, all of whom Acreman claimed were lying.

4. Edward Payne, Gary Acreman's father-in-law, testified at the evidentiary hearing. Edward Payne is 60 years old. Because of cancer, he could not speak through his mouth and testified only with the aid of a "voice box" that he held up to his throat. Payne stated that on the day of the murder, Saturday, August 23, 1980, Acreman came home from the high school and was acting very nervous, was "shaking real bad", and kept pacing back and forth. Gary Acreman appeared so completely shaken that Payne thought he was on the verge of a nervous breakdown. Acreman then told Payne that a girl had been killed at the high school and that he wanted to go back to the school and help find the girl's clothes. (The Conroe Police Department found the girl's clothes in a plastic bag located in the school dumpster on Monday, August 25th.)

Edward Payne additionally testified that he was beaten up by a relative of Acreman's after Payne decided to come forward and reveal what Acreman stated, and how Acreman acted, when he had returned home from the high school on the day of the murder.

(It should be noted, as previously stated, that Gary Acreman admitted at the evidentiary hearing that he did in fact tell his father-in-law, Edward Payne, that he had seen someone throw the girl's clothes in the dumpster. Acreman stated, however, that he had told his father-in-law on the Sunday following the murder, not the Saturday of the murder, as his father-in-law had testified. Acreman additionally testified that he was not surprised when the police eventually found the girl's clothes in the dumpster on Monday, August 25, 1980.)

On the following day, Sunday, Edward Payne told his brother and sister-in-law about what Acreman had said.

The Court finds that Edward Payne was a credible witness and that his testimony was truthful.

5. John Herman Payne, age 56, is the younger brother of Edward Payne. John Payne testified at the evidentiary hearing. On Sunday, August 24, 1980, the day after the girl's rape and murder at the high school, John Payne and his wife had visited Edward Payne. Edward Payne then told him and his wife that Gary Acreman had come home from the high school the day before and was real excited and was pacing up and down the driveway. Acreman wanted to borrow Edward Payne's car to go to the school to show the police where the girl's clothes were hidden.

The Court finds that John Herman Payne was a credible witness and that his testimony was truthful.

6. Georgia Cooper testified at the evidentiary hearing. She worked at the City Cab Company in Conroe at the time the girl was raped and murdered at the high school. Gary Acreman also worked at the cab company part time. Shortly after Clarence Brandley was arrested for the crime, Georgia Cooper and several other cab employees were talking about the murder at the office of the cab company. While the employees were talking about the murder, Gary Acreman interjected that Clarence Brandley did not commit the murder and that "he" (Acreman) knew who had done the murder but that he would never tell.

The Court finds that Georgia Cooper was a credible witness and that her testimony was truthful.

7. Roger White testified at the evidentiary hearing. White's grandmother and several friends worked at the City Cab Company in Conroe at the time of the rape and murder at the high school. A few days after Clarence Brandley was charged, White came to pick up his grandmother at the cab company. While White was at the cab company, he heard a woman named Connie Miller make a statement that she didn't believe that Clarence Brandley had committed the crime. After Ms. Miller made that statement, Gary Acreman stated that Clarence Brandley didn't do it and that he (Acreman) knew who did commit the crime.

The Court finds that Roger White was a credible witness and that his testimony was truthful.

8. Connie Jane Miller testified at the evidentiary hearing. She lived in Conroe, Texas when the rape and murder occurred at the high school. While Ms. Miller was at the office of the City Cab Company shortly after Clarence Brandley's arrest, a disheveled man came in and introduced himself as Gary Acreman, the new part time cab driver. When Ms. Miller stated to one of the other cab employees that she didn't believe Clarence Brandley had committed the murder, Gary Acreman jumped up from where he was sitting and exclaimed that Clarence Brandley didn't commit the murder and that he (Acreman) knew who did.

The Court finds that Connie Jane Miller was a credible witness and that her testimony was truthful.

9. Brenda Medina testified at the evidentiary hearing on July 17, 1986. At the time of the murder at the Conroe high school on August 23, 1980, she and James Dexter Robinson were living together. On the day of the murder, James Dexter Robinson came home after midnight, awakened Ms. Medina, and said that he had to leave the state because he had killed a girl. Robinson stated that he had hidden the girl's body well enough so that no one would find her until he was out of town.

When Robinson left town early that morning, he left behind his tennis shoes which had spots of blood on them.

Sometime in May of 1986, Brenda Medina first revealed to her attorney, W. B. Etheridge, the substance of Robinson's extra judicial confession on the evening of the murder. W. B. Etheridge, a 68 year old attorney with over 30 years of legal experience in Montgomery County, felt that Brenda Medina's information was very important and needed to be investigated. Accordingly, Etheridge immediately informed the District Attorney, Peter Speers. The Sunday night before the 1986 summer evidentiary hearing, Etheridge also informed Clarence Lee Brandley's attorney, Mike DeGeurin. Etheridge felt compelled to call DeGeurin when he learned that the District Attorney had never informed defense counsel of the extra-judicial confession of Robinson furnished by Brenda Medina. (The record reflects that after Etheridge informed District Attorney Peter Speers of the extra-judicial confession given to Brenda Medina, the District Attorney's Office proceeded to interview Brenda Medina and to tape said interview. The record further reflects, however, that the District Attorney failed to notify defense counsel of the newly discovered exculpatory evidence and in fact denied, in open court, that any exculpatory evidence existed.)

Although the Court did not have the opportunity to observe the countenance of Brenda Medina, her testimony is consistent with the other evidence received at the hearing.

10. James Dexter Robinson testified at the evidentiary hearing. Robinson admitted that he had in fact told Brenda Medina that he had killed a girl. Robinson claimed, however, that he told Brenda he had killed a girl during the time that he was working at the high school, sometime shortly before Cheryl Fergeson's murder. Robinson denied killing Cheryl Fergeson and claimed the alibi that he had left Conroe in the early morning hours on August 7, 1980 and moved to South Carolina. Although Robinson claimed that he was living in South Carolina on the day of the murder, August 23, 1980, five witnesses—Gary Acreman, John Sessum, Brenda Medina, Reginald Slacum and Debra Cheney—testified that they saw James Dexter Robinson in Conroe on the day of the murder, or a few days prior to the murder.

James Dexter Robinson's sister, Debbie Ann Clardy, was flown in from South Carolina to testify at the evidentiary hearing. Ms. Clardy testified that she remembered seeing James Dexter Robinson at a birthday party in South Carolina one week before Cheryl Fergeson's murder. Ms. Clardy returned home after the birthday party, however, and could not say whether Robinson stayed in South Carolina or returned to Conroe before the murder.

James Dexter Robinson's uncle, Odis Salters, was also flown in from South Carolina to testify at the evidentiary hearing. Salters claimed that Robinson was in South Carolina during the week following the birthday party and the week preceding Cheryl Fergeson's murder because Salters remembers that he and Robinson worked different shifts at the same plant. Robinson admitted, however, that he had not begun working in South Carolina until sometime in September of 1980, several weeks after the murder.

The Court finds that James Dexter Robinson was not a credible witness and that his testimony was not worthy of belief.

The Court further finds that the testimony of Robinson's sister and uncle was inconsistent with other credible evidence and of little probative value.

11. Debra Cheney testified at the evidentiary hearing. She had lived in Conroe on the date of the murder and was a next door neighbor of Brenda Medina and James Dexter Robinson. Debra Cheney saw James Dexter Robinson in Conroe three days before the murder, on Wednesday, August 20, 1980, when James Robinson came to the City Health Clinic with Brenda Medina.

The Court finds that Debra Cheney was a credible witness and that her testimony was truthful.

12. Reginald T. Slacum, Jr. testified at the evidentiary hearing on August 21, 1986. During the summer of 1980, Slacum was employed as a janitor at the Conroe high school. Slacum saw James Dexter Robinson in Conroe on August 20, 1980, three days before the murder. August 20th was a payday, and Robinson had come to Slacum's home to collect an Amway debt. Robinson shoved Slacum while trying to collect the money. Slacum recalls that the date was August 20, 1980 because after Robinson's visit, Slacum went to the hospital emergency room and thereafter missed two weeks of work.

Although the Court did not have an opportunity to observe the countenance of Reginald Slacum, his testimony is consistent with the other evidence received at the hearing.

13. Kathy Binford testified at the evidentiary hearing. In 1979, she was employed as a crew chief for Organic Lab, Inc. From May, 1979 through July, 1979, Gary Acreman was employed as a truck driver on Ms. Binford's crew. Gary Acreman was fired in July of 1979 after she witnessed Acreman sexually assault a female co-worker in the stock room. Ms. Binford additionally testified that other female workers at the company had complained about Acreman's sexual advances.

It should be noted that Acreman testified, without any documents or corroborating testimony of any nature, that he had been fired from Organic Lab, Inc. because of a vehicular accident, not because of the sexual assault.

The Court finds that Kathy Binford was a credible witness and that her testimony was truthful. The Court finds that Gary Acreman was not truthful when he testified that he was fired by Organic Lab, Inc. because of a vehicular accident.

14. Cheryl Bradford, age 24, a coach at Langhum Creek High School, testified at the Evidentiary Hearing. Ms. Bradford had been a volleyball player for Waller High School in 1980 and was present at Conroe High School on the day of Cheryl Fergeson's murder. Ms. Bradford knew Ceryl Fergeson and saw her as they passed in the hallway. As they passed, Ms. Bradford was returning from the restrooms to the gym and Cheryl Fergeson was headed in the direction of the restrooms from the gym area. Ms. Bradford returned to the gym after she had passed Cheryl Fergeson in the hall. Approximately 20 to 30 minutes later, Ms. Bradford noticed two white males walk quickly across the top of the bleachers in the gym and then exit a door to the outside of the school. The general description of the two men matched the general discription of Gary Acreman and James Dexter Robinson.

When Ms. Bradford returned home on the afternoon of the murder, she told her volleyball coach, Sylvia Ash, that she had some important information that the police should know about regarding Cheryl Fergeson's murder. Ms. Bradford and her coach then called the Conroe Police Department. Ms. Bradford testified that the police were not real interested in her information and were in a rush to get her off the phone. After Ms. Bradford reported her information regarding the two white men, neither the Conroe police, Texas Ranger Wesley Styles, nor any other agency, ever called her back or personally visited her to discuss her inforation.

While Ms. Bradford was watching the "60 Minutes" program during the spring of 1987, she got "chills" when she saw the photograph of James Dexter Robinson shown on the television. Ms. Bradford thereafter contacted the authorities to again report the information that she had seen two white males hurriedly pass through the gym and exit outside approximately 20 to 30 minutes after Cheryl Fergeson had left the gym on the way towards the restroom. No explanation was given why the State never pursued this information nor why it was never disclosed to defense counsel.

The Court finds that Cheryl Bradford was a credible witness and that her testimony was truthful.

15. Both Gary Acreman and James Dexter Robinson have Type A blood. Type A blood was found on the clothing of the victim. Petitioner has Type O blood. The Court notes that it was only in April of 1987, when the Attorney General's Office began their investigation, that it became known that both Gary Acreman and James Dexter Robinson had Type A blood. Prior to the Attorney General's investigation, the Montgomery County District Attorney's Office had successfully resisted the efforts by defense counsel to obtain blood samples from possible suspects who were present at the school on the date of the murder.

II.

In his Second Claim for Relief, Petitioner alleges:

> PETITIONER WAS DENIED DUE PROCESS OF LAW AND A FUNDAMENTALLY FAIR TRIAL BECAUSE THE TRIAL JUDGE AND THE DISTRICT ATTORNEY SYSTEMATICALLY CONDUCTED SECRET EX PARTE DISCUSSIONS REGARDING PETITIONER'S CASE.

The Court has complied with the June 30, 1987 Order of the Court of Criminal Appeals, which specifically directed the trial court to hear evidence regarding the Petitioner's above-quoted allegation. Based on the extensive testimony received and the credibility determinations regarding said testimony, the Court finds that the trial judge and the district attorney conducted ex parte discussion regarding Petitioner's case and that said discussions denied Petitioner due process of law and a fundamentally fair trial. Specifically, the Court makes the following Findings of Fact:

1. The trial judge and the district attorney conducted ex parte meetings in the mornings prior to trial of Petitioner's case. These meetings were outside the presence of defense counsel and were conducted without notice to, and without the knowledge of, defense counsel. Counsel for Petitioner did not become aware of the ex parte meetings between the judge and the district attorney until after the conclusion of Petitioner's trial and after the time allowed to file a motion for new trial.

The Court finds that the testimony of Janet Dial, Judge Martin's secretary during the Brandley trial, that District Attorney Keeshan and Judge Martin met in Judge Martin's

chambers in the mornings prior to trial, is credible and truthful and was not rebutted by credible evidence. The Court further finds that Judge Martin's absolute denial of any ex parte meetings is not credible.

2. The district attorney and the trial judge resolved significant issues regarding Petitioner's case without first giving notice to defense counsel, and wholly outside the presence of defense counsel.

3. The issue regarding Petitioner's bond was decided by the trial judge and the district attorney without any notice to defense counsel and without defense counsel being present. When Petitioner's attorney sought to post the $30,000.00 surety bond that had been set, the Montgomery County Sheriff, Gene Reaves, refused to accept the bond and release Petitioner. In refusing to accept the bond, Sheriff Reaves had no legal justification. He simply stated that he didn't want "the little nigger to hit the street." District Attorney James Keeshan agreed, also stating that he didn't want the "little nigger" on the street. The Judge ordered the Sheriff to accept the bond.

When Petitioner's attorneys returned the following day to again attempt to post the $30,000.00 bond and secure the Petitioner's release, the attorneys were served by the District Attorney's Office with a Motion to Increase Bond. Attached to the Motion to Increase Bond was an Order which had already been signed ex parte by the Judge. The Order raised Petitioner's bond to $70,000.00.

The Court notes that the Record of Petitioner's trial corroborates the testimony that Judge Alworth raised Petitioner's bond upon an ex parte motion by District Attorney Keeshan without notice to defense counsel.

4. The District Attorney and the trial judge conducted ex-parte meetings regarding the trial exhibits which had become missing. (It was the District Attorney's intention that Petitioner's attorneys never be informed that an entire box of trial exhibits had disappeared. In order to facilitate the cover-up, the district attorney attempted to secretly re-construct the record with fake exhibits). Once Petitioner's attorneys learned that there was an apparent problem regarding the trial exhibits, counsel set a hearing to determine the status of the record. The day before the scheduled hearing, Judge John Martin met with district attorney James Keeshan after hours in the district attorney's office. Defense counsel were not invited. At the meeting it was decided that the district attorney should be allowed to speak out of turn at the hearing and the judge would then rule that the defense could not call any witnesses in an effort to determine what happened to the missing exhibits. The district attorney and the trial judge met secretly at least two other times concerning the missing exhibits.

III.

In his Third Claim for Relief, Petitioner alleges:

> THE PETITIONER WAS DENIED DUE PROCESS OF LAW WHEN THE TRIAL JUDGE AND THE DISTRICT ATTORNEY SECRETLY AGREED TO CONCEAL FROM DEFENSE COUNSEL THE FACT THAT EVIDENCE HAD BECOME "MISSING" WHILE IN THE CUSTODY OF THE STATE.

The Court has complied with the June 30, 1987 Order of the Court of Criminal Appeals, which specifically directed the trial court to hear evidence regarding the

Petitioner's above-quoted allegation. Based on the extensive testimony received and the credibility determinations regarding said testimony, the Court finds that the trial judge and the district attorney secretly agreed to conceal from defense counsel the fact that trial exhibits had become missing, thereby denying Petitioner due process of law. Specifically, the Court makes the following Findings of Fact:

1. Sometime in early January, 1982, an entire box of trial exhibits became missing. The box of exhibits had been in the possession of Judge John Martin's court reporter, Mary Johnson. The contents of the box included Henry "Icky" Peace's gun, the victim's clothing which contained spots of blood, several knives, various trial documents, and glass slides which contained the four (4) hairs found near the victim's vagina. One of the four hairs was a *Caucasian* pubic hair which belongs to neither the victim nor her boyfriend. At the time the caucasion pubic hair became missing, the district attorney had successfully prevented all efforts by the defense attorneys to have a pubic hair sample obtained from Gary Acreman so that Acreman's pubic hair could have been compared to the Caucasian pubic hair found near the victim's vagina.

2. Judge Martin's court reporter, Mary Johnson, immediately informed the Judge when it became known that the exhibits had become missing. The Judge then immediately informed the district attorney. The District Clerk, Peggy Stevens, was also immediately informed. Neither the Judge, the District Attorney nor the District Clerk informed defense counsel. Both District Attorney Keeshan and Judge Martin instructed Mary Johnson that the defense attorneys should not be told about the missing exhibits because they would "just make a big deal about it."

3. It was the intention of District Attorney Keeshan that defense counsel never learn that important trial exhibits had become missing. Keeshan accordingly attempted to secretly reconstruct the record with fake, altered exhibits. While the district attorney was in the process of attempting to cover up the missing evidence and conceal the fact from defense counsel, the District Clerk, Peggy Stevens, would stall and divert inquiries about the original record. The district clerk would also warn the district attorney. When defense counsel Don Brown asked Peggy Stevens about the original exhibits, and then informed Peggy Stevens that he was going to go and personally inquire with the district attorney, Peggy Stevens hurried to the district attorney's office to warn Keeshan. The district clerk and the district attorney then hid together in the district attorney's office while the district attorney's secretary diverted the attorney who had come to ask about the trial exhibits. District Clerk Stevens thought the incident was funny, and laughed when she came to Judge Martin's chambers to report how she and District Attorney Keeshan had fooled defense counsel about the missing exhibits by hiding together in the District Attorney's office.

The Court finds that the District Clerk Peggy Stevens was not a credible witness and that her testimony was not truthful.

4. Although both Judge Martin and District Attorney Keeshan had designed to keep secret the fact that the trial exhibits had become missing, the defense attorneys eventually became aware after several different individuals felt an ethical duty to come forward and release the secret. Frank Robin, an assistant district attorney who worked for James Keeshan, eventually informed defense counsel that critical trial exhibits had become missing. Although District Attorney Keeshan had instructed Robin not to tell anyone, Robin felt an ethical obligation to disclose the secret to defense counsel. The Court finds that Frank Robin was a credible witness and that his testimony was truthful.

Mary Johnson, Judge Martin's court reporter, had been asked to be part of the cover-up regarding the missing evidence. She eventually felt an ethical obligation to inform defense counsel of the cover-up. Mary Johnson was afraid to personally call defense counsel and inform them, however, so she was assisted by Judge Martin's secretary, Janet Dial. Because of her fear of the judge and the district attorney, Mary Johnson requested that defense counsel never mention her name in connection with who released the secret regarding the missing exhibits and the cover-up conspiracy. Accordingly, from 1982 until the evidentiary hearing, Janet Dial has been silently shouldering the blame in Montgomery County for informing defense counsel about the conspiracy to cover-up the fact evidence had become missing. (It should be noted that Mary Johnson attended an ex parte meeting between

Judge Martin and District Attorney Keeshan where the two decided that defense counsel Don Brown would not be allowed to have a hearing regarding the missing exhibits. When Don Brown presented Judge Martin with a recusal motion at the hearing held the next day, based on the ex parte meetings Judge Martin had been conducting with the district attorney, Mary Johnson felt she would be fired by Judge Martin and thought she actually had been fired after the meeting. Mary Johnson later learned that she had not been fired and that Judge Martin and District Attorney Keeshan were under the mistaken impression that Janet Dial, not Mary Johnson, had informed defense counsel of the cover-up.) Janet Dial resigned in June, 1981.

5. The record will reflect that on March 12, 1982, two months after the trial judge and the district attorney learned that trial exhibits had become missing, defense counsel were officially informed of the missing evidence. The record will also reflect that defense counsel were at that time denied the opportunity to call witnesses in an effort to make a record regarding the circumstances of the missing evidence. In officially informing defense counsel, the court pronounced, as learned from the district attorney, that an unnamed janitor or janitors had unintentionally thrown out the box of exhibits on an unspecified date.

6. Mary Johnson testified at the evidentiary hearing that she did not believe the story floated at the courthouse that some janitors had accidentally thrown out the exhibits. She testified that the custodial staff at the courthouse had instructions not to enter or clean her office, and were not supposed to have keys to her office. Mary Johnson further testified that the box of exhibits—which included a gun, several knives, and the victim's clothes—in no way resembled a box of trash which could have been accidentally thrown out.

The Court finds that Mary Johnson was in all respects a credible witness and that her testimony was truthful.

7. Then District Attorney Keeshan, now Judge Keeshan, testified at the evidentiary hearing that he had become "somewhat satisfied" that the janitors had played a role in the missing exhibits. Neither Judge Keeshan, nor any other witness, however, revealed the name or names of any janitors who were supposedly suspected of having thrown out the exhibits, or who were interviewed in connection with any investigation of the incident.

8. Defense attorneys were denied any input in determining if the trial exhibits were actually missing. Defense attorneys were also denied the opportunity to participate in locating the exhibits, if the exhibits are in fact missing.

IV.

In his Fourth Claim for Relief, Petitioner alleges:

> PETITIONER WAS DENIED FUNDAMENTAL FAIRNESS AND DUE PROCESS OF LAW BY THE FACT THAT CRITICAL EVIDENCE HAVING THE POTENTIAL TO PROVE THAT THE PETITIONER IS INNOCENT WAS LOST AND DESTROYED WHILE IN THE EXCLUSIVE POSSESSION OF THE STATE.

The Court has complied with the June 30, 1987 Order of the Court of Criminal Appeals, which specifically directed the trial court to hear evidence regarding Petitioner's above-quoted allegation. Based on the extensive testimony received and the credibility determinations regarding said testimony, the Court finds that critical evidence, having the potential to prove the Petitioner's innocence, was lost or destroyed while in the exclusive possession of the State, thereby denying Petitioner fundamental fairness and due process of law. Specifically, the Court makes the following Findings of Fact:

1. An autopsy was performed on the victim, Cheryl Fergeson. As part of the autopsy, cotton swabs were used to take fluid samples from the victim's vagina. The swabs tested positive for spermatoza. No tests were performed, however, to establish the blood grouping of the donor of the spermatoza. No records exist as to when the swabs were disposed of or who disposed of them. The record reveals, however, that the swabs were not available when requested by defense counsel shortly after the murder and prior to the first trial.

2. Detective Ralph Yarbrough, a Sargeant in the Sex Crimes Unit of the Homicide Division of the Houston Police Department, testified at the evidentiary hearing. Detective Yarbrough is an expert in the field of sex crime investigations and has participated in the investigation of over 1000 rape cases. The cotton swabs from a victim's vagina have critical evidentiary value in a rape investigation--particularly in a capital case. Tests performed on the swabs can determine the bloodtype, R H factor and other genetic characterizations of the donor of the spermatoza. Through such tests, suspects can be scientifically excluded as the perpetrator of the rape homicide. It is standard police procedure, both in 1980 and today, to preserve the vaginal swabs for comparison with all potential and future suspects. There is no scientific justification to discard the vaginal swabs taken from the rape victim.

3. Five janitors were working at Conroe High School on the day of the murder. Clarence Brandley, the head janitor and supervisor, was the only black man. A blood sample was taken from Clarence Brandley after the murder, but no samples were taken from Gary Acreman or the other persons present when the victim approached the restroom.

Even after the new evidence was discovered this past year, neither the Montgomery County District Attorney's office nor any law enforcement agency in Montgomery County obtained a blood sample from Gary Acreman or James Dexter Robinson. It was only after the Attorney General's Office entered the investigation in the spring of 1987 that blood samples were finally obtained from Gary Acreman and James Dexter Robinson. Gary Acre-

man has type A blood. James Dexter Robinson has type A blood. The blood found on the blouse of the victim was also determined to be type A blood. Clarence Brandley has type O blood. Had the vaginal swabs been tested to determine the blood type of the donor of the spermatoza, Clarence Brandley could have been scientifically excluded as a suspect.

4. In Petitioner's circumstantial evidence case, it would have been important for the jury to have learned that another janitor had the same type blood that had been found on the victim's clothes.

5. The court heard testimony at the evidentiary hearing that a cotton swab taken from a rape victim was analyzed by the F.B.I. after the swab had been left for 12 years on the shelf of the Elizabeth New Jersey Police Department's Porperty Room, in a paper envelope and in an unrefrigerated state. The F.B.I. analysis of the 12 year old swab revealed that the donor of the spermatoza, found in the rape victim's vagina, had a different blood type than the man who had been convicted and sent to prison for life. Because the analysis of the swab scientifically established the innocence of the man wrongly convicted, the Federal District Court in New Jersey granted the man a new trial.

6. Four hairs were found near the victim's vagina. One of the hairs was a caucasion pubic hair which was neither the victim's nor her boyfriend's. Despite the fact that a caucasion pubic hair was discovered near the victim's vagina, District Attorney Keeshan refused to take hair samples from Gary Acreman and the other two white janitors who were present when the victim was dragged into the restroom and murdered. District Attorney Keeshan

also resisted all efforts made by defense counsel to have hair samples removed from Gary Acreman and the other two janitors. Keeshan testified at the evidentiary hearing that he resisted the defense attempt to have Gary Acreman and the others provide hair samples because it would have been a "needless imposition."

7. The testimony at the evidentiary hearing unequivocally establishes that Gary Acreman and James Dexter Robinson are prime suspects and probably were responsible for the death of Cheryl Lee Fergeson. Because the caucasion pubic hairs, and the other nonnegroid hairs found near the victim's vagina, had disappeared sometime in January of 1982, Clarence Lee Brandley is now denied the opportunity to have the hair of Gary Acreman and James Dexter Robinson scientifically compared to the four hairs found on the victim.

V.

In his Fifth Claim for Relief, Petitioner alleges:

> THE PRETRIAL INVESTIGATIVE PROCEDURES UTILIZED BY THE STATE WERE SO IMPERMISSIBLY SUGGESTIVE OF THE PETITIONER THAT IT CREATED FALSE TESTIMONY CALCULATED TO MANUFACTURE CIRCUMSTANTIAL EVIDENCE AGAINST THE PETITIONER IN VIOLATION OF HIS CONSTITUTIONAL RIGHTS TO DUE PROCESS OF LAW AND A FUNDAMENTALLY FAIR TRIAL.

The Court has complied with the June 30, 1987 Order of the Court of Criminal Appeals, which specifically directed the trial court to hear evidence regarding the Peti-

tioner's above-quoted allegation. Based on the extensive testimony received and the credibility determinations regarding said testimony, the Court finds that the pretrial investigative procedures utilized by the State were so impermissibly suggestive that false testimony was created, thereby denying Petitioner due process of law and a fundamentally fair trial. Specifically, the Court makes the following Findings of Fact:

1. Petitioner's conviction was based entirely on circumstantial evidence: there were no eye witnesses, no scientific evidence of any significant probative value, and no confession.

2. The primary evidence against Petitioner was the circumstantial testimonial evidence given by the other janitors who were present at the high school on the day of the murder.

The murder occurred at Conroe high school on Saturday, August 23, 1980. Classes were scheduled to resume in less than ten days. Testimony at the evidentiary hearing established that the authorities had announced to the public that they would have a suspect arrested prior to the start of class. District Attorney Keeshan requested the assistance of Texas Ranger Wesley Styles. Ranger Styles began his investigation the evening of Thursday, August 28, 1980. The next day, before first interviewing any witnesses, Ranger Wesley Styles arrested Petitioner, Clarence Lee Brandley.

The arrest occurred on the Friday before school was scheduled to start. On Saturday, August 30, 1980, Ranger Styles had janitors Gary Acreman, Sam Martinez and John Sessum come to the high school. Ranger Styles then conducted a "walk through" whereby the janitors, in the presence of each other, were given the opportunity to tell Styles what had happened on the day of the murder. Of the three janitors present, Gary Acreman did most of the talking at the "walk through". District Attorney Keeshan was not present. Charlie Ray, an investigator for the District Attorney's Office, was present for the walk through, although Ray did not testify at the evidentiary hearing.

After the "walk through", Gary Acreman, Sam Martinez and John Sessum were all consistent as to the critical sequence of events and the critical time frames. Ranger Styles did not take written statements from the janitors prior to the walk through. Styles instead waited to take statements until Acreman, Martinez and Sessum had been walked through the school together and questioned in each others presence. Although Ranger Styles had conducted the "walk through" with Acreman, Martinez and Sessum, Styles did not supervise the taking of the janitors' sworn statements immediately following the "walk through". Ranger Styles testified that he has no idea whether the sworn statements are acurate. Ranger Styles was suprised, and could offer no explanation, why John Sessum's post "walk through" statement was not signed until September 30, 1980—one month after the walk through.

4. Henry "Ickie" Peace testified at the Evidentiary Hearing. Peace was the key witness for the State at Petitioner's trial. Peace testified that he cannot read or write and that the police wrote his pre-trial statement. After the police had written the statement, Peace asked if his sister or brother could read the statement to him. The police refused. Peace then signed the statement, stating at the Evidentiary Hearing, "I have no idea what was on my statement." Peace further testified that the police made him initial an additional piece of paper, claiming they had made a mistake. Peace had no idea what changes the authorities made.

Shortly after the murder, Texas Ranger Wesley Styles appeared at Peace's house sometime after dark. Ranger Styles then transported Peace to the Cleveland, Texas Police Station and kept him there until approximately 1:30 in the morning. While in the car, Styles threatened to blow Peace's brains out. Ranger Styles then roughed Peace up and threatened him at the station. At one point, Styles grabbed Peace by a chain he wore around his neck, twisted the chain and then shoved him up against the wall while choking Peace with the chain. The Court notes that Peace is a very small man, perhaps less than five feet tall. Ranger Wesley Styles is a large man, over six feet tall and well built.

Peace testified that he was afraid of Ranger Styles when Styles interrogated him in 1980. Peace further testified that he is still afraid of Styles today. Peace committed perjury at Petitioner's trial.

Peace complained to the District Attorney's Office about Styles roughing him up and threatening him. The District Attorney's Office told Peace that he was "hallucinating" and "imagining things" and that he couldn't prove it anyway because it would be his word against the Ranger's. The District Attorney never disclosed the *Brady* material to defense counsel.

5. John Sessum testified at the Evidentiary Hearing that he was intimidated by Texas Ranger Wesley Styles and was afraid to tell Styles the truth. At one point during the "walk through" conducted by Styles, Styles threatened to arrest Sessum if Sessum didn't cooperate. Sessum testified that he is still afraid of Ranger Styles today.

Although Sessum's pre-trial statement after the walk through is consistent with the pre-trial statements of the other janitors after the walk through, Sessum's statement was false, as was his testimony at Petitioner's trial. Sessum testified that Gary Acreman talked to the girl as she approached the janitors seated on the stairs, followed her up the stairs on the way to the restroom, talked to the girl at the top of the stairs, and then grabbed the girl, accompanied by a man later identified as James Dexter Robinson, as the girl called: "No", "No", "Don't" and "Help". Clarence Lee Brandley didn't arrive on the scene until approximately five or ten minutes later and after the girl's calls for help were silenced.

In addition to being afraid of Ranger Styles, Sessum was also threatened by Gary Acreman. Acreman drove Sessum home from the high school on the day of the murder. While riding home, Acreman warned Sessum not to tell anyone that he had talked with the girl. Acreman also drove Sessum to the police station when Acreman and Sessum gave their statements and to the school for the walk through. On the way, Acreman again warned Sessum not to tell anyone that he had talked with the girl outside the restroom.

In March of 1987, a stranger assaulted Sessum as he was riding his bicycle home from work. The stranger inquired if he were John Sessum, then punched him, and then asked about the video taped statement Sessum had made which implicated Acreman in the death of Cheryl Fergeson. Sessum testified that he is still afraid of Acreman today.

Sessum was not called as a witness at Petitioner's second trial. District Attorney Keeshan elected not to call Sessum because he would not have been helpful to the State's case.

In the statement he gave two days after the murder, when he was alone and did not have the assistance of Gary Acreman, Sam Martinez stated that the victim had walked up the stairs and headed to the bathroom after Clarence Brandley had already come up the stairs. (The Court notes that at trial both Acreman and Martinez were consistent in their trial testimony that Clarence Brandley came up the stairs shortly after the girl had entered the restroom. The consistent testimony was certainly critical to the State's circumstantial case.) Although Sam Martinez

had given a sworn statement two days after the murder which was wholly at odds with the State's version of events proffered at trial, Martinez testified at the evidentiary hearing that he "got it straight" after Ranger Styles took him through the "walk through" accompanied by Gary Acreman and John Sessum. Martinez did not admit that Acreman had talked to the girl minutes before her murder until the evidentiary hearing.

6. The Court finds that the investigation in Petitioner's case had a "blind focus". The authorities wholly ignored any evidence, or leads to evidence, which might prove inconsistent with their premature conclusion that Petitioner had committed the crime. The conclusion is inescapable that the investigation was conducted not to solve the crime, but to convict the Petitioner.

For example, the authorities wholly ignored the lead provided by Cheryl Bradford that she had witnessed two white males hurriedly exit the gym area shortly after the victim was last seen alive.

The authorities also failed to take hair samples from the caucasion janitors present at the school on the day of the murder, even though the authorities knew, prior to the indictment of Clarence Brandley, that a caucasion pubic hair had been found near the victim's vagina. After defense counsel learned of this caucasion pubic hair, the district attorney succesfully resisted all efforts to have hair samples taken from Gary Acreman and the other white janitors.

The "blind focus" of the investigation is also apparent from the manner in which Ranger Wesley Styles wholly failed to investigate the information he had obtained from Henry "Ickie" Peace on the night of the walk through. The information provided by Peace indicated that Acreman may have begun to float a false story regarding the murder and may have known more about the murder than he had told Styles that afternoon when Styles had walked Acreman, Martinez and Sessum through the high school. Nonetheless, Ranger Styles never again interviewed Acreman or pursued Peace's information in any other manner. The Court finds that Styles failed to conduct a proper investigation in that the Ranger operated with the state of mind that he had already gotten his man, and that he was not going to investigate any leads that might prove his preconception wrong.

VI.

In his Sixth Claim for Relief, Petitioner alleges:

> TEXAS' DEATH PENALTY SYSTEM, AS APPLIED, DISCRIMINATES AGAINST BLACK DEFENDANTS IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION.

The court notes that this claim is essentially the issue addressed by the Supreme Court in *McCleskey v. Kemp*, 107 S.Ct. 1756 (1987). The *McCleskey* decision was decided on April 22, 1987: approximately six weeks prior to the Court of Appeals' June 30, 1987 order which granted Petitioner a full hearing on all issues, including Petitioner's *McCleskey* issue.

In *McCleskey v. Kemp*, the Supreme Court held that a defendant may not establish a constitutional violation solely through statistical evidence which establishes that blacks charged with the killing of a white have the far greatest likelihood of receiving the death penalty. Instead, the Supreme Court held that a defendant, in order to establish an Equal Protection Clause violation, must offer "evidence specific to his own case that would support an inference that racial considerations played a part in his sentence." 107 S.Ct. at 1766-67.

In accordance with the pleadings of the Petitioner and the June 30, 1987 order of the Court of Criminal Appeals, the Court allowed Petitioner to offer into evidence statistical evidence to establish that the probability of being executed in Texas is significantly enhanced when a black person is charged with killing a white victim. Consistent with the *McCleskey* decision, however, the court also afforded Petitioner an opportunity to introduce non satistical evidence establishing that racial considerations played a part in *his* case. Based on the testimony received and the credibility determinations regarding said testimony, the Court unequivocally concludes that the color of Clarence Brandley's skin was a substantial factor which pervaded all aspects of the State's capital prosecution against him, and was an impermissible factor which significantly influenced the investigation, trial and post trial proceedings of Petitioner's case. Specifically, the Court makes the following Findings of Fact:

1. The Petitioner, Clarence Brandley, is a black man.

2. The victim, Cheryl Fergeson, was a 16 year old white girl.

3. Dr. Sheldon Ekland-Olson, testified at the evidentiary hearing as an expert witness. Dr. Ekland-Olson is a faculty member at the University of Texas at Austin. He holds a doctorate degree in Sociology and also attended Yale Law School.

Dr. Ekland-Olson conducted a research project which analyzed the application of the death penalty in Texas during the years 1974-1983, the first decade of the "new" Texas death penalty statute. Unlike the death penalty statutes in other states such as Florida and Georgia, the Texas statute is a "structured" or "guided discretion" statute, designed to eliminate the racial disparity in the application of the death penalty which the Supreme Court found offensive and unconstitutional in *Furman v. Georgia*.

Using data collected from the several hundred Texas capital convictions which occurred during the first decade of the post-*Furman* statute, Dr. Ekland-Olson sought to determine whether Texas' new guided discretion statute was in fact being applied in a non-discriminatory manner.

After accounting for the significant variables, Dr. Ekland-Olson's analysis of the data revealed that the Texas death penalty statute, as applied, has not produced non-discriminatory results. Significant race-linked discrimination exists in that capital cases involving white victims are more likely to precipitate the death penalty than cases involving black victims.

The research regarding rape homicides in Texas, the offense for which Petitioner was convicted, reveals that the most likely person to receive the death penalty in Texas is a black man convicted of the rape homicide of a white woman. Taking into account all of the various offenses eligible for the death penalty in Texas, and all of the many possible offender/victim racial combinations, the probability of being executed in Texas is increased five fold for a black man convicted of the rape homicide of a white woman.

The research of Dr. Sheldon Ekland-Olson, establishing that the Texas death penalty statute has produced victim-based racial discrimination, is consistent with the other research done in Texas and throughout the country, particularly the sophisticated Baldus study which the Supreme Court accepted as statistically valid in the *McCleskey* case.

4. The jury in Petitioner's first trial was all white. The State had used peremptory challenges to strike all qualified blacks.

5. The jury in Petitioner's second trial was all white. The State had used peremptory challenges to strike all qualified blacks.

6. At the time of Petitioner's first and second trials, the District Attorneys Office in Montgomery County utilized several prosecution manuals. The manuals were resource or reference books which instructed the prosecutors on all aspects of how to try a criminal case. The manual recommended that black persons not be allowed to serve on any criminal jury.

7. At the time of Petitioner's first and second trials, a routine or practice existed in the Montgomery County District Attorney's office that all black persons were to be stricken from the jury panel when there was a black defendant. Had any Assistant District Attorney allowed a black person to serve as a juror, the District Attorney, James Keeshan, would have required that assistant to explain why he departed from standard practice by allowing a black person to serve on a criminal jury.

8. No lawyer having practiced in Montgomery County can recall a black person ever being permitted to serve on a jury when there was a black defendant, except one instance in 1978 when a black Conroe police officer was allowed to serve on a jury.

9. The jury at Petitioner's first trial ultimately became deadlocked 11 to 1 for conviction. The lone holdout, William Shreck, failed to vote for conviction because he felt that the State had not proven Petitioner's guilt beyond a reasonable doubt. During the deliberations, the other jurors repeatedly called William Shreck a "Nigger lover". After a mistrial was declared, William Shreck received thousands and thousands of harassing phone calls. During the first month, the harassing calls would arrive every five seconds when the phone was left on the hook. On those occasions when the phone was answered, the caller would exclaim "nigger lover" and then hang up.

In April of 1987, six years after the mistrial was declared, William Shreck applied for the position of purchasing agent for Montgomery County. Of the seventy-odd applicants for the job, William Shreck was selected

as one of the several finalists. Mr. Shreck had considerable experience based on the thirty-odd years he was employed as a purchasing agent for an oil company in Houston. As a finalist, the five district judges and the county commissioner of Montgomery County interviewed William Shreck. During the 45 minute interview, approximately 35 minutes was consumed by the judge's questions regarding why Shreck did not vote for conviction at the first Brandley trial in 1980. Judge Keeshan asked many of the questions. The district judges than told William Shreck that his "not guilty" vote at the first trial demonstrated that he could not get along with people. The judges denied Mr. Shreck the job.

10. Shortly after the victim's body was found on August 23, 1980, a white Conroe police officer had a conversation with Henry Peace regarding who perpetrated the murder. The officer then turned towards Clarence Brandley and announced to Peace that "The nigger was elected".

11. Prior to Petitioner's first trial, Petitioner's attorneys approached the Sheriff of Montgomery County, Gene Reaves, to post Petitioner's bond. Bond had been set at Thirty Thousand ($30,000.00) Dollars and Petitioner's attorneys had good and sufficient surety to make the bond. The Sheriff refused to accept the bond, however, stating that "The little Nigger doesn't belong on the ground." District Attorney James Keeshan was present and agreed, echoing the Sheriff's phrase that the "little Nigger doesn't belong on the ground."

After both Sheriff Reaves and District Attorney Keeshan made their intentions clear that they didn't want the "little Nigger" to make bond, Keeshan met with Judge

Lee Alworth without any notice to defense counsel. Judge Alworth thereafter signed an ex parte order prepared by Keeshan which raised Petitioner's bond to Seventy Thousand ($70,000.00) Dollars.

12. Racial considerations infected the atmosphere within the courtroom during Petitioner's trial. Many members of the public, both black and white, attended Petitioner's trial. The Montgomery County Sheriff's Department treated the black spectators differently, however. When a black person exited the courtroom during trial, one of the numerous sheriff's deputies on hand would follow the black person from the courtroom and keep the person under observation. An elderly black gentleman, Reverend J. J. Robinson, pastor of the Mt. Hebron Baptist Church in Houston, was even followed by a deputy when he went to the restroom.

Several witnesses testified at the evidentiary hearing that a powerful feeling of prejudice and racial tension pervaded the courtroom. Judge Martin's secretary, Janet Dial, heard an elderly white woman openly repeat to herself in the courtroom, but plainly audible to others, "Kill the nigger, kill the nigger . . ." The sheriff's deputies allowed the woman to remain in the courtroom.

The Reverend Anderson Davis, a highly educated person in his middle 60's, testified that of the many trials that he has personally witnessed over the years in the States of Texas, Georgia, Virginia and Tennessee, on only one other occasion did he experience a trial where the racial tension in the courtroom compared to that of the Brandley trial. The trial was in Chattanooga, Tennessee in 1964 when a prosecution witness stated, without reproach from the court, that he knew three things about "niggers": They all lie, steal and smell.

The tone of the courtroom, as fostered by the District Attorney's Office, the Judge and the District Clerk's Office, was white against black. One example of this white against black atmosphere is evident in an in-chambers discussion during the penalty phase, where the district attorney complains to the trial judge that a black woman had sat on a white woman's hand. District Attorney Keeshan further reveals his personal white versus black posture when he suggests that if any announcements to the audience are necessary, he will make an announcement to the white people and Petitioner's attorney could make an announcement to the black people. Wholly apart from the judge's legal rulings, the demeanor and attitude of the judge was hostile to the Petitioner and the black members of the audience. The Reverend J. J. Robinson testified that the judge's attitude towards Petitioner and the black people in the audience clearly revealed the judge's partiality in the case. The Reverend did not feel comfortable even being in the courtroom.

13. During Petitioner's second trial, a "team-like" or "company" atmosphere existed at the courthouse between Judge Martin's staff, the District Attorney's Office and the District Clerk's Office. The "project" or "goal" of the team was to convict the Petitioner. Employees of Judge Martin's staff and the District Clerk's Office felt pressure to be team players and were too intimidated to act impartially towards Petitioner or to even voice any suggestion regarding Petitioner's possible innocence.

The "project-like" atmosphere pervaded the courthouse during Petitioner's second trial. The atmosphere existed even after the conviction, as evidenced by the agreement, between Judge Martin, the District Attorney and the Dis-

trict Clerk, to keep secret the fact that critical exhibits had become missing. A sordid instance where the "project like" mentality overbore any sense of justice and decency at the courthouse can be seen in the conduct of the District Clerk and the District Attorney when Attorney Don Brown began inquiring about the missing trial exhibits. When Don Brown informed District Clerk Peggy Stevens that he was going to ask District Attorney Keeshan about the missing exhibits, Peggy Stevens rushed to warn Keeshan at his office. Keeshan and Peggy Stevens then hid in the district attorney's office and laughed when Don Brown arrived and the District Attorney's secretary got rid of him. The "project-like" atmosphere culminated on November 22, 1985, when Judge John Martin, at the special request of District Clerk Peggy Stevens, set Petitioner's execution date for January 16, 1986—the District Clerk's birthday. (It should be noted that Judge Martin had no authority to even set Petitioner's execution date, let alone set the execution to coincide with the District Clerk's birthday celebration. Judge Martin had no authority because he had voluntarily recused himself from further handling of Petitioner's case in March, 1982, after defense counsel had confronted the Judge, on March 5, 1982, with the knowledge that the Judge had conducted ex parte meetings with the District Attorney regarding Petitioner's case.)

Based on the demeanor of Judge John Martin the two occasions that he testified, and the credibility determinations that the Court made regarding other witnesses at the evidentiary hearing, the Court finds that Judge Martin's testimony, perhaps tempered by a motive for self-preservation, was simply not credible.

VII.

When Texas Ranger Wesley Styles testified at the evidentiary hearing, he was in possession of a taped statement he had taken from Henry "Ickie" Peace on September 3, 1980. Because the existence of the statement had never been previously disclosed to Petitioner, Petitioner's counsel made an oral motion to amend their Second Application for Writ of Habeas Corpus. The oral amendment added a new claim for relief, as follows:

> PETITIONER WAS DENIED DUE PROCESS OF LAW AND A FAIR TRIAL BECAUSE THE STATE FAILED TO DISCLOSE, AND INTENTIONALLY SUPPRESSED, A STATEMENT OF HENRY "ICKIE" PEACE WHICH CONSTITUTED BOTH *GASKIN* AND *BRADY* MATERIAL.

The Court granted Petitioner's oral motion to amend and heard evidence on Petitioner's additional allegation. Based on the testimony received and the credibility determinations regarding said testimony, the Court concludes that the State intentionally failed to disclose the existence of the September 3, 1980 statement of Henry "Ickie" Peace, thereby denying Petitioner due process of law and a fair trial. Specifically, the Court makes the following Findings of Fact:

1. Henry "Ickie" Peace was the State's key witness at Petitioner's trial.

2. On September 3, 1980, Texas Ranger Wesley Styles, assisted by Charlie Ray, took a taped statement from Henry "Ickie" Peace. At the time of Petitioner's first and second trials, Charlie Ray was employed as an investigator for District Attorney James Keeshan. Charlie Ray is cur-

rently employed as an investigator for District Attorney Peter Speers, and sat at the State's counsel table during the evidentiary hearing.

3. Although the State produced other statements of Henry Peace at Petitioner's first and second trials, the State never informed defense counsel that the State possessed a statement from Henry Peace taken on September 3, 1980. Th State had a duty to disclose Peace's statement of September 3, 1980, just as the State had a duty to disclose the other statements of Peace which the State did in fact disclose.

4. Ranger Styles testified at the evidentiary hearing on October 7, 1987. Styles claimed that he had forgotten about the statement of Peace until "one week ago". Styles further claimed that he had "just happened to think about the tape" seven years after he had obtained the statement and thereafter proceeded to retrieve the tape from the attic in his home. Styles then gave the tape to the Montgomery County District Attorney's office on Thursday, September 17, 1987, or Friday, September 18, 1987. Upon receiving the tape, the District Attorney's office did not inform Petitioner's counsel. Nor did the District Attorney inform Petitioner's counsel when Henry "Ickie" Peace was called as Petitioner's first witness at the evidentiary hearing. Investigator Charlie Ray failed to testify at the evidentiary hearing.

5. Wesley Styles, pursuant to his duties as a law enforcement officer for the Texas Department of Public Safety, complied an offense report regarding his investigation in the Brandley case. Although Styles' report mentions all witnesses' statements that were taken during the investigation, the report fails to reveal that any statement

was taken from Henry "Ickie" Peace on September 3, 1980. Accordingly, Petitioner's counsel did not learn of Peace's statement when Ranger Styles produced his offense report at Petitioner's trial.

6. The Court finds that Wesley Styles' explanation regarding Peace's statement of September 3, 1980 was not credible and truthful. The Court finds that Wesley Styles and the Montgomery County District Attorney's Office intentionally failed to disclose the existence of the statement to defense counsel to deprive defense counsel of the opportunity to use the statement for cross-examination.

CONCLUSION

In the thirty years this Court has presided over matters in the judicial system, no case has presented a more shocking scenario of the effects of racial prejudice, perjured testimony, witness intimidation, an investigation, the outcome of which was predetermined, and public officials who, for whatever motives, lost sight of what is right and just. The continued incarceration of Clarence Lee Brandley under these circumstances is an affront to the basic notions of fairness and justice.

The Court respectfully recommends that Clarence Lee Brandley be granted a new trial.

/s/ PERRY D. PICKETT
Perry D. Pickett
Judge Presiding